

Disputes and Pluralism in Modern Indonesian Land Law*

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* *Editor's Note:* Indonesian legal publications are unfortunately delinquent about including full publication information. The year of publication, for example, is invariably omitted, and virtually no indications are given as to whether subsequent printings are merely reprints or revised editions. *The Yale Journal of International Law* has taken the utmost care in "bluebooking" the footnotes, and feels some solace that many scholars have found similar problems in effectively handling Indonesian legal materials. See, e.g., E. DAMIAN & R. HORNICK, *BIBLIOGRAFI HUKUM INDONESIA 1945-1970* at xix-xxiv; H. Darmawi, *Land Transactions Under Indonesian Adat Law*, 3 *LAWASIA* 284, 284 (1972).

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I. INTRODUCTION

The Preamble to Indonesia's Basic Agrarian Law of 1960 ("the BAL") states that the current land law of Indonesia is incompatible with the interests of the people and the state, as it is based upon the objectives and principles of the colonial government.¹ The Explanatory Memorandum expands on this notion by explaining that the pluralism of colonial land law, in which diverse customary (*adat*) laws existed alongside Western-style statutory law, is inconsistent with nation-building and fails to provide legal certainty to autochthonous Indonesians.² The BAL's stated objective, therefore, is to lay the foundation for a national agrarian law that provides legal unity, simplicity, and certainty to all Indonesians, and prosperity, happiness, and justice for the nation and the people, including farming communities.³ The BAL seeks to do this in the syncretic way beloved by Indonesians: on the one hand, it converts all existing statutory rights, and most *adat* rights, into a range of Western-

1. See Law No. 5, 1960 Lembaran Negara Republik Indonesia 104 [hereinafter L.N.] (Sept. 24), Undang Undang Pokok Agraria [Basic Principles of Agrarian Law] [hereinafter BAL] (Indon.). Independent Indonesia's attempt to formulate a postcolonial, national agrarian law began in 1948 (three years after the Declaration of Independence but while the Dutch "police action" remained active) with the formation of an agrarian committee by nationalists in Java. The committee's deliberations led to some interim reforms of colonial agrarian law that particularly focused on the unlawful occupation of former colonial private estates. However, consensus on the form and content of a national agrarian law was not reached for another twelve years. This was largely due to disagreement over the role that customary law and principles should play in creating national law and over whether a unified national law should be created by rapid codification or by incremental judicial reform. See SUDARGO GAUTAMA & ROBERT N. HORNICK, AN INTRODUCTION TO INDONESIAN LAW—UNITY IN DIVERSITY 79 (4th ed. 1983). For a detailed discussion of these aspects of the legal unification debate in colonial and postcolonial Indonesia, see Daniel Lev, *The Lady and the Banyan Tree: Civil Law Change in Indonesia*, 14 AM. J. COMP. L. 282 (1965) [hereinafter Lev, *The Lady*]; Daniel Lev, *The Supreme Court and Adat Inheritance Law in Indonesia*, 11 AM. J. COMP. L. 205 (1962) [hereinafter Lev, *Supreme Court*].

2. See BAL, Explanatory Memorandum, General Elucidation, pt. I. For a discussion of the view that colonial legal pluralism discriminated against autochthonous Indonesians, see GAUTAMA & HORNICK, *supra* note 1, at 1; see also JOHN BALL, *INDONESIAN LEGAL HISTORY: 1602-1848*, at 226-27 (1982). As to Van Vollenhoven and ter Haar's belief that some form of pluralism was necessary to protect the interests of the diverse groups in Indonesian society, see B. TER HAAR, *ADAT LAW IN INDONESIA* 12-14 (A. Arthur Schiller & E. Adamson Hoebel eds. & George C.O. Haas & Margaret Hordyk trans., 1948); see also Lev, *The Lady*, *supra* note 1, at 284; Lev, *Supreme Court*, *supra* note 1, at 206.

3. See BAL, Explanatory Memorandum, General Elucidation, pt. I.

style, registrable land rights; on the other hand, it explains that these rights are based upon *adat* law and have a social function that emphasizes the needs of the community over those of the individual.

Thirty-six years later, it is apparent that the BAL's objectives of legal unity and certainty have not been attained and will not be attained in the foreseeable future. The Indonesian government estimates that no more than twenty percent of all registrable land, and only ten percent in rural areas, has been registered under the BAL.⁴ The number and severity of disputes over land have increased dramatically.⁵ Large tracts of newly settled areas, both urban and rural, now exist without the certainties that established *adat* authority or the BAL can provide.⁶ The courts have allowed a vaguely defined principle of "development" to override purportedly mandatory legislative requirements.⁷ In short, a new and even more uncertain form of pluralism has arisen in postcolonial Indonesian land law and administration.

This Article analyzes the causes and nature of this new pluralism. It argues that, in practice, the BAL is not a syncretic amalgam of Western and *adat* principles but instead operates contrary to *adat*, particularly in its imposition of Western-style, individualized land titles on customary forms of tenure. This inconsistency with *adat* has two fundamental consequences. First, the process of registering titles under the BAL itself creates long-term disputation and social conflict, and, for that reason, is highly unlikely to fulfill its objective of legal certainty. Second, the BAL's failure to provide legal certainty, in combination with the erosion or subjugation of *adat* authority in many areas, has created a dangerous legal vacuum and allowed ad hoc bureaucratic fiat to dominate the administration and development of land in Indonesia.

Part II of this Article explores these arguments by analyzing modern Indonesia's failure to attain unified land law under the BAL. After a brief discussion of the colonial legacy of legal pluralism, it considers the nature of *adat* and *adat* land law. It then outlines the scheme of the BAL, in particular its purported amalgamation of *adat* principles with Western-style statutory rights. The efficacy of this approach is first tested by reference to the treatment of communal *adat* titles under the BAL. This exercise establishes that the BAL's *adat* features have not counteracted its Western-style individualizing tendencies; that *adat* and the BAL are incompatible, and that, for this reason, the process of registering titles under the BAL will create conflict rather than certainty. These conclusions are supported by case studies of title registration disputes in the regions of Minangkabau and Ambon. They are then used to criticize current Indonesian and World Bank programs to accelerate the process of title registration in Indonesia, a particular problem with these programs being that the adjudication committee contains no members drawn from traditional *adat* authority.

4. See *Land Agency To Review Rule on Holding Size*, JAKARTA POST, Oct. 12, 1993, at 2.

5. See *Land-Love Strong Among Villagers*, JAKARTA POST, Mar. 15, 1995, at 1; cf. *Land-for-Land Solution Proposed*, JAKARTA POST, May 9, 1995, at 1 (discussing House Speaker's suggestions for protecting people from displacement from land).

6. See *infra* Section III.B.

7. See *infra* Section III.D.

Part III considers the high levels of conflict, uncertainty, and inequitable development that characterize the new pluralism in Indonesian land law. It begins by analyzing three aspects of this uncertainty: first, the disassociation of *adat* practice from state law; second, the erosion of *adat* authority in Java and urban areas; and third, the widespread phenomenon of unlawful occupancy. Taken together, these three contemporary phenomena have resulted in a significant increase in land conflicts in modern Indonesia.

Part IV goes on to consider the way in which the BAL has helped to engender a vicious cycle in the process of development in Indonesia. The defining feature of this cycle is that both developers and the bureaucracy eschew the uncertainties of dealing with unregistered *adat* titles in favor of acquiring land at below-market price through arbitrary application (or sometimes nonapplication) of the laws on land acquisition. This phenomenon, and the role of the courts in allowing it, is illustrated by an extensive consideration of the *Kedung Ombo Dam Case* and the *Sentani Airport Case*. The *Kedung Ombo Dam Case* also illustrates the perverse way in which the BAL's incorporation of *adat* principles (in particular, the notion that rights to land have a social function) has been used to justify failure to comply with the laws on land acquisition. In this way, the Article comes full circle: It shows that, in the context of rapid economic development, the current conflict-ridden and inequitable state of Indonesian land law and administration is inseparable from flaws in the structure and application of the BAL itself.

The Article concludes with an outline of reforms that would address many of these issues. The proposed reforms include a recommendation that the BAL's ill-fated attempt at incorporating *adat* principles into formal law be repealed. Instead of amalgamating *adat* with the state, the replacement should create appropriate links between the two, with the objective being a balanced dualism between them, rather than the present hegemony of state and bureaucracy. This would be done, in part, by providing a range of registration choices that would reflect the tremendous regional diversity in Indonesia and by creating a separate and independent Land Court to deal with the central issue of dispute resolution.

II. THE FAILURE OF UNIFICATION

A. *The Colonial Heritage of Legal Pluralism*

The foundation of Holland's pluralistic legal legacy to Indonesia was its private law distinctions among "Europeans," "Native Indonesians," and "Foreign Orientals."⁸ "Europeans" were subject to civil and commercial codes imported from Holland in 1848. Autochthonous Indonesians were governed by their various *adat* laws and by a small number of colonial

8. See GAUTAMA & HORNICK, *supra* note 1, at 2-14 (discussing definitions of "European," "Native Indonesian," and "Foreign Oriental" used in colonial private law and way in which members of one group could change their legal status to that of another group). These distinctions remain valid in modern Indonesia by virtue of the transitional provisions of the 1945 Constitution. See INDON. CONST. (Constitution of 1945) art. II (Transitional Provisions); GAUTAMA & HORNICK, *supra*.

regulations expressly made applicable to them.⁹ "Foreign Orientals" were also governed by their own customary law until their participation in the colonial economy led the Dutch administration to apply the Civil and Commercial Codes to them.¹⁰ Upon independence, Indonesia adopted this legal pluralism pending the development of laws better suited to a modern, independent nation.¹¹

Thus it was that, prior to the passage of the BAL in 1960, Indonesian land law remained governed by two separate and distinct bodies of law. The first was known as "Western land law," as it was regulated by the Civil Code and included a system of hierarchical rights ranging from ownership (*eigendom*) to lease (*erfpacht*) and use (*gebruik*).¹² The second was *adat* law, the nature of which will be considered below. This division of law led, in turn, to a distinction between "Western land" and "Indonesian land."¹³ Western land was land subject to Western land rights, but it could be held by foreigners, autochthonous Indonesians, and the "Oriental Group" alike.¹⁴ Indonesian land was subject either to *adat* rights or to the special "native" proprietary right known as *agrarische eigendom*.¹⁵ From 1870 to 1875, it could be leased or purchased by nonautochthonous Indonesians.¹⁶ From 1875, however, alienation to nonnatives of land held under *adat* rights was significantly restricted.¹⁷

9. See GAUTAMA & HORNICK, *supra* note 1, at 9.

10. "Chinese Orientals" became subject to almost all of the Civil and Commercial Codes in 1917. "Non-Chinese Orientals" became subject to the Codes in 1925, save in relation to family law and intestate succession, where customary law continued to apply. See *id.* at 12-14.

11. See INDON. CONST. (Constitution of 1945) art. II (Transitional Provisions).

12. See GAUTAMA & HORNICK, *supra* note 1, at 77. *Eigendom* was unlimited in time and gave the power to sell, give, or otherwise dispose of the land. See *id.* (discussing INDON. CIV. CODE arts. 570-672). *Erfpacht* was a right in another's land that gave all the incidents of ownership save that it was limited in time, and activities that might reduce the land's value could not be undertaken on it. See *id.* at 78 (discussing INDON. CIV. CODE arts. 720-36). *Gebruik* was a right of use in another's land, of limited duration, which could be held by natural persons only, and was able to be transferred, leased, or mortgaged. See *id.* (discussing INDON. CIV. CODE arts. 818-29).

13. It is estimated that less than five percent of land in Indonesia was classified as Western land. See COLIN MACANDREWS, *LAND POLICY IN MODERN INDONESIA* 20 (1986). There were also small areas of registered "Chinese land," which was land subject to the special "Oriental" land right known as *landerijen bezitsrecht*. This was a statutory right of ownership in former private estate land allowed to Chinese and Foreign Orientals. See GAUTAMA & HORNICK, *supra* note 1, at 71-72 (discussing Royal Decree No. 45, 1913 Staatsblad 702 [hereinafter S.] (Oct. 22) (Indon.)).

14. See SUDARGO GAUTAMA & BUDI HARSONO, *SURVEY OF INDONESIAN ECONOMIC LAW: AGRARIAN LAW* at vii-viii (1972). Professor Gautama is one of Indonesia's leading lawyers. Budi Harsono is currently Minister for Agrarian Affairs and is Indonesia's preeminent commentator on Indonesian land law.

15. See GAUTAMA & HORNICK, *supra* note 1, at 71. *Agrarische eigendom* was a statutory right of ownership in "Indonesian" land in Java and Madura that could be created through the conversion of individually held *adat* "ownership" rights. See *id.*

16. See GAUTAMA & HARSONO, *supra* note 14, at viii.

17. See GAUTAMA & HORNICK, *supra* note 1, at 72 (discussing Ordinance, 1875 S. 179 (Aug. 4) (Indon.)). However, nonnatives could still obtain *adat* rights to Indonesian land through inheritance or mixed marriages. See *id.*

B. *The Nature of Adat*1. *Regional Diversity in Indonesian Adat*

A brief survey of the tremendous regional variation in Indonesian society shows that the concept of the Indonesian *adat* is an elusive one.¹⁸ In some areas, such as Hindu Bali and the matrilineal (but Islamic) Minangkabau of West Sumatra, *adat* rules are quite detailed, sometimes written, and exhibit such a high degree of predictability, application, and adherence that they take on many of the characteristics of "law."¹⁹ In other societies, such as those of the shifting cultivators of Kalimantan and Irian Jaya and the subsistence farmers of Eastern Indonesia, *adat* is unwritten and exhibits itself in patterns of traditional ritual and kinship relations rather than prescriptive rules and maxims.²⁰ In Aceh, the most Islamic of Indonesian provinces, an interesting syncretic combination of the predominant Islamic culture and remnant matrilinealism may be discerned.²¹ Among the Batak of North Sumatra, a number of oral maxims, of varying prescriptive content, are derived largely from the dictates of a patrilineal and exogamous subclan structure, and then distilled through a formal process of consensual decisionmaking known as *runggun*.²² In Java, a fundamental divide exists between "*santri*" Muslims, who place strong, monotheistic emphasis on the centrality of religious doctrine in social relations, and the more populous "*abangan*" Muslims, who syncretize pantheistic animism with Hindu and Islamic beliefs.²³

18. See generally Hildred Geertz, *Indonesian Cultures and Communities*, in *INDONESIA* 24, 24-96 (R. McVey ed., 1967) (documenting disparate conceptions of *adat*).

19. For a description of the detailed nature of community rules (*awig-awig*) in Bali, see CAROL WARREN, *ADAT AND DINAS: BALINESE COMMUNITIES IN THE INDONESIAN STATE* 11-13 (1993). For a discussion of the "innumerable" proverbs and sayings in Minangkabau *adat* rules, see FRANZ VON BENDA-BECKMANN, *PROPERTY IN SOCIAL CONTINUITY: CONTINUITY AND CHANGE IN THE MAINTENANCE OF PROPERTY RELATIONSHIPS THROUGH TIME IN MINANGKABAU, WEST SUMATRA* 114 (1979).

20. See, e.g., WILLIAM CONLEY, *THE KALIMANTAN KENYAH: A STUDY OF TRIBAL CONVERSION IN TERMS OF DYNAMIC CULTURAL THEMES* 69-70 (1976); 1 *ETHNIC GROUPS OF INSULAR SOUTHEAST ASIA* 147-97 (Frank LeBar ed., 1972); CARL HOFFMAN, *THE PUNAN: HUNTERS AND GATHERERS OF BORNEO* 36, 47 (1986).

21. The remnant matrilinealism in Aceh may be seen in the custom that upon marriage a man must move into his wife's home, which is built by her parents in the family compound. See CORNELIS VAN HOLLEMAN, *VAN VOLLENHOVEN ON INDONESIAN ADAT LAW* 79 (J.F. Holleman ed., 1981). The author's personal experience in Aceh is that this custom remains very strong.

22. See MASRI SINGARIMBUN, *KINSHIP, DESCENT AND ALLIANCE AMONG THE KARO BATAK* (1975); see also E.M. LOEB, *SUMATRA: ITS HISTORY AND PEOPLE* 74-81 (1972); Herman Slaats & Karen Portier, *Legal Plurality and the Transformation of Normative Concepts in the Process of Litigation in Karo Batak Society*, in *ANTHROPOLOGY OF LAW IN THE NETHERLANDS* 217, 218-22 (Keebet von Benda-Beckmann & Fons Strijbosch eds., 1986).

23. See KARL D. JACKSON, *TRADITIONAL AUTHORITY, ISLAM, AND REBELLION* 78 (1980); C. Geertz, *Ritual and Social Change: A Javanese Example*, 59 *AM. ANTHROPOLOGIST* 35-37 (1957). A similar version of syncretist Islam may be found among the Sasaks of Lombok. See SVEN CEDERROTH, *THE SPELL OF THE ANCESTORS AND THE POWER OF MEKKAH* 2, 86-88 (1981). President Suharto is regarded as an *abangan* Muslim and is said to consult soothsayers and family spirits regularly. More recently, however, he has been forced to seek support from *santri* Muslims as his support among a new generation of army officers has diminished. See ADAM SCHWARZ, *A NATION IN WAITING* 171 (1994).

2. Universal Principles of Adat

Despite this diversity, it is generally argued by anthropologists and the Leiden school of Dutch *adat* scholars that certain universal principles underpin the operation of all local *adat* rules.²⁴ Of these, the most fundamental is the emphasis that *adat* places on maintaining an appropriate equilibrium (*rukun*) among individuals, the community, and the cosmos.²⁵ This emphasis on equilibrium arises out of an intense interaction between the living and the spirit worlds in traditional Indonesian societies.²⁶ Rituals are seen as particularly central to maintaining the protection of natural and ancestral spirits against personal and communal misfortune.²⁷ This focus on ritual and cosmology fosters a very strong sense of communal solidarity, which is underpinned by kinship relations and a magico-religious identification with land.²⁸ Thus, another universal principle is identified in *adat*, namely, that collective interests outweigh those of the individual.²⁹ Together, these principles of equilibrium and collective unity are said to reflect *adat*'s fundamental role in balancing such basic oppositional forces in Indonesian society as rights and obligations, egalitarian and hierarchic tendencies, and

24. See Peter Burns, *The Myth of Adat*, 28 J. LEGAL PLURALISM 1, 1-29 (1989) (discussing Leiden school's belief in universal *adat* principles).

25. Warren puts it well: "Village *adat* is basically about the ordering of relationships—human, material and spiritual—in a system where cosmic and social forces cannot be divorced." WARREN, *supra* note 19, at 38.

26. Although it is impossible to cover the great variety of such beliefs throughout Indonesia, some discussions offer a representative analysis. For a description of the interaction between living and spirit worlds among the Karo Batak of North Sumatra, see SINGARIMBUN, *supra* note 22, at 21-29. As to the belief of the Dou Donggo of Eastern Sumbawa that social and kinship relations encompass both the dead and the unborn, see generally Peter Just, *Dou Donggo Social Organisation: Ideology, Structure, and Action in an Indonesian Society* (1986) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with author). As to the rich pantheistic and anthropomorphic cosmology of the sedentary Dayaks of Kalimantan and the way in which this is maintained by complicated rituals and ceremonies, see ETHNIC GROUPS OF INSULAR SOUTHEAST ASIA, *supra* note 20, at 147-97. For a general examination of the overriding supernaturalism among the Kalimantan Kenyah, see CONLEY, *supra* note 20, at 45-153. For a description of the intense interaction between living and spirit worlds among the Tetum, see DAVID MICKS, *A MATERNAL RELIGION: THE ROLE OF WOMEN IN TETUM MYTH AND RITUAL* 90 (Monograph Series on Southeast Asia, Ctr. for Southeast Asian Studies, N. Ill. Univ., Special Report No. 22, 1984). For a description of the relationship between Javanese *abangan* Muslims and the spirit world (including spirits in the banyan tree in the village square), see JACKSON, *supra* note 23, at 78. As to the extremely powerful cosmological beliefs of the Balinese, see WARREN, *supra* note 19, at 38-39.

27. For example, the Karo Batak sustain the protection of archetypal male and female spirits known as *Pa Megoh* and *Nande Megoh* through ceremony and ritual. See SINGARIMBUN, *supra* note 22, at 21. Failure to observe taboos and deference to elders among the Dou Donggo of Eastern Sumbawa leads to the loss of protection of benevolent spirits. See Just, *supra* note 26, at 234. Birth, death, marriage, and circumcision rituals are fundamental to preventing misfortune among Javanese *abangan* Muslims. See JACKSON, *supra* note 23, at 78. Rituals and ceremonies form the basis of community welfare in traditional Balinese life. See WARREN, *supra* note 19, at 139-63.

28. See KOENTJARANINGRAT, *VILLAGES IN INDONESIA* 253 (1967) (providing anthropological studies showing powerful connection between land and magico-religious social structure in Indonesia); see also LEONTINE E. VISSER, *MY RICE FIELD IS MY CHILD: SOCIAL AND TERRITORIAL ASPECTS OF SWIDDEN CULTIVATION IN SAHU, EASTERN INDONESIA* 103-05, 123-24 (1989); TOBY ALICE VOLKMAN, *FEASTS OF HONOR: RITUAL AND CHANGE IN THE TORAJA HIGHLANDS* 49-50 (1985); WARREN, *supra* note 19, at 36-42.

29. See MICHAEL BARRY HOOKER, *ADAT LAW IN MODERN INDONESIA* 55 (1978). Of course, the strength of this principle will vary from region to region.

territorial and kinship loyalties.³⁰

In part, *adat*'s emphasis on equilibrium and collective unity may be ascribed to the relative absence in Indonesian societies of Western-style, hierarchical, and self-validating decisionmaking processes.³¹ Ultimately, however, the notions of equilibrium and collective unity are inseparable from the pervasive mysticism in Indonesian society. In Eastern Indonesia, in particular, maintaining the harmony of oppositional forces is regarded as essential for the spiritual health not only of the community but also of the world as a whole.³² Even in Western Indonesia, where Islam has put down stronger roots, legends of disaster following social and religious imbalance remain highly influential.³³ This mysticism may be attributed to a number of sources, including the strong influence of Hinduism and Hindu myths,³⁴ the proselytizing of a flexible and syncretic form of Islam by Sufi missionaries,³⁵ and animist reverence for the ancestral dead and their burial places.³⁶

3. Is Adat "Law"?

A recurring theme in *adat* literature, made relevant here by the BAL's incorporation of *adat* concepts into formal law, is the extent to which *adat* is "law" as opposed to mere custom. A positivist analysis would say that, whereas some *adat* is concerned with maintaining cosmological and communal equilibrium, other *adat* is concerned with restoring it; therefore, the latter is "law" because it involves some form of sanction.³⁷ But, to the average Indonesian villager, the question of penalty is never independent of the ultimate goal of cosmological equilibrium.³⁸ Because the processes by which this equilibrium is achieved are fluid and result-oriented and because the sanction of *adat* is interwoven with cosmological beliefs and territorial or

30. See *id.* at 33-48; see also HILDRED GEERTZ & CLIFFORD GEERTZ, KINSHIP IN BALI 168 (1975) (discussing forces in Bali that oppose yet balance one another). For a discussion of equilibrium and dualism in Eastern Indonesia, see James J. Fox, *Category and Complement: Binary Ideologies and the Organisation of Dualism in Eastern Indonesia*, in THE ATTRACTION OF OPPOSITES: THOUGHT AND SOCIETY IN THE DUALISTIC MODE 33, 51-53 (David Maybury-Lewis & Uri Almagor eds., 1989) (discussing equilibrium and dualism in Eastern Indonesia).

31. See SUSAN BOLYARD MILLAR, BUGIS WEDDINGS: RITUALS OF SOCIAL LOCATION IN MODERN INDONESIA 34-35 (Monograph Series, Ctr. for South and Southeast Asian Studies, U.C. Berkeley, Monograph No. 29, 1989) (analyzing absence of formal authority and way in which informal authority is garnered over time through personal appeal and ideology among Bugis of South Sulawesi).

32. See GEERTZ & GEERTZ, *supra* note 30, at 167.

33. This influence is demonstrated by the manner in which the Suharto government considered the unusual step of charging a prominent Javanese soothsayer with subversion—which is punishable by death—for prophesying that violence and disorder would characterize the last years of the Suharto regime. See *NU Enters Fray in Support of Permadi*, JAKARTA POST, Apr. 13, 1995, at 1.

34. See M.C. HOADLEY & M.B. HOOKER, AN INTRODUCTION TO JAVANESE LAW: A TRANSLATION OF AND COMMENTARY ON THE AGAMA 12, 15-29 (1981).

35. See HOOKER, *supra* note 29, at 91.

36. See WARREN, *supra* note 19, at 37.

37. See, e.g., John Griffiths, *Recent Anthropology of Law in the Netherlands and Its Historical Background*, in ANTHROPOLOGY OF LAW IN THE NETHERLANDS, *supra* note 22, at 11, 20 (analyzing Van Vollenhoven's view that *adat* law could be distinguished from *adat* by presence of sanction).

38. For an excellent discussion of this proposition from a contemporary Indonesian scholar, see JOHN SALINDEHO, MASALAH TANAH DALAM PEMBANGUNAN [THE PROBLEM OF LAND WITHIN DEVELOPMENT] 154, 259-61 (1988); see also VON BENDA-BECKMANN, *supra* note 19, at 116-18.

kinship loyalties, no simple distinction can be drawn between *adat* and *adat* law.³⁹

One consequence of this is that *adat* resists analysis based on Western notions of enforceable "rights" and "obligations." Instead, the regulation of *adat* communities, and the interaction of those communities with other *adat* groups, rests squarely on traditional processes of deliberation and consensus (*mufakat* and *musyarawat*) and mutual assistance (*gotong royong*).⁴⁰ These processes are identified as universal *adat* principles and viewed as national characteristics.⁴¹ In some societies, they involve formal institutions of consensual decisionmaking.⁴² In most societies, however, they are informal requirements that are instrumental to balancing oppositional forces in society, particularly to serve the principles of equilibrium and collective unity discussed above.

An important point derived from this analysis of *adat* is that, to the extent that there are universal *adat* principles, they are so embedded in local social structure, and so lacking in Western-style legal predictability and consistency, that it is difficult to see how they can be incorporated into formal law, particularly in the context of a patrimonial state bent on rapid economic development.⁴³ This argument is further illustrated below through an analysis of the BAL in practice. First, however, it is necessary to make a related point: Although *adat* derives from traditional village or kinship communities,⁴⁴ it is not necessarily defined or circumscribed by them.

39. See SALINDEHO, *supra* note 38, at 254-61; cf. HOOKER, *supra* note 29, at 145-51 (illustrating "difficulties in the application of concepts from Western jurisprudence to [non-Western] ethnography").

40. Indeed, it is fundamental to *adat* that these *adat* processes are far more significant than "rights" per se. See HOOKER, *supra* note 29, at 28; Daniel Lev, *Judicial Institutions and Legal Culture in Indonesia*, in *CULTURE AND POLITICS IN INDONESIA* 246, 283-84 (Clare Holt ed., 1972); cf. MOHAMMED KOESNOE, REPORT CONCERNING A CO-OPERATIVE RESEARCH OF ADAT LAW ON THE ISLANDS OF BALI AND LOMBOK 65-67, 96 (1978) (asserting that "aim of any study into Adat law [is] to know how . . . the decisions are related to the structure of communing life and the values of working in it"). As to the fundamental influence of social structure on the nature of legal "rules," see generally HOOKER, *supra* note 29, at 149-51. For a Balinese case study, see Danker H. Schaareman, *Context and the Interpretation of Adat Rules in Bali*, in *ANTHROPOLOGY OF LAW IN THE NETHERLANDS*, *supra* note 22, at 195-217.

41. This process is important for many groups in Indonesia. See Herman Slaats and Karen Portier, *Some Notes on Administering Justice in Karo-Land North Sumatra*, in *BEYOND SAMOSIR: RECENT STUDIES OF THE BATAK PEOPLES OF SUMATRA* (R. Smith Kipp & R. Kipp eds., 1983) (discussing importance of these processes in Karo Batak law in North Sumatra); G. van den Steenhoven, *Musjawarah in Karo-land*, 7 *LAW & SOC'Y REV.* 693, 693-718 (1973); see also VON BENDA-BECKMANN, *supra* note 19, at 92, 117 (discussing central role of these processes in Mingangkabau *adat*).

42. See, e.g., *supra* text accompanying note 22 (discussing *runggun* procedure in Karo Batak society).

43. At first glance, this analysis seems inconsistent with Dworkin's proposition that legal rules can only be derived from underlying community morality. See RONALD DWORKIN, *LAW'S EMPIRE* 256 (1986). The classic example of this principle in the common law is the notion that the right to recover in negligence is derived from the Christian principle of "love thy neighbor." See *Donoghue v. Stevenson*, 1932 App. Cas. 562, 580 (appeal taken from Scot.). However, this Article seeks to show that in the context of a patrimonial, development-oriented state, lacking an independent judiciary and governing through an oligarchic alliance of army, commercial interests, and bureaucracy, the process of transforming community (*adat*) morality into formal law has not occurred. In fact, the state in contemporary Indonesia has subverted the whole process by using it to give legal legitimacy to the ad hoc exercise of executive power. See *infra* Subsection III.D.2.

44. Jural communities in Indonesia are delineated either on territorial or on genealogical lines, and sometimes on a combination of the two. See HOOKER, *supra* note 29, at 34-41; TER HAAR, *supra* note

Modern anthropologists tend to eschew the deification of autonomous *adat* villages by colonial scholars in favor of recognizing the complex interaction of kinship groups, hierarchical obligations, territorial loyalties, religious bodies, agricultural associations, and external influences in ordinary *adat* life.⁴⁵ For present purposes, the relevant consequence of this view is that *adat* principles may continue as a system of shared values, and a network of relationships, notwithstanding that discrete, semi-autonomous villages no longer exist in a particular area. This point is relevant both to the erosion of *adat* authority in many areas of modern Indonesia and to the question of reform. It is also further considered below.

C. *The Nature of Adat Land Law*

1. *The Community Right of Control Known as Hak Ulayat*

Although applying Western legal terminology to Indonesia is inadequate,⁴⁶ it is nevertheless convenient for the purposes of this Article to describe the relationship between *adat* and land in terms of "law," "rights," and "obligations." Thus one can say that *adat* land law recognizes a number of individual rights to land, including rights to possess, use, harvest, pledge, lease, and priority to buy.⁴⁷ The nature and strength of these rights vary from region to region.⁴⁸ They are most common in urban areas and in Java, but far less prevalent in West Sumatra, Bali, Kalimantan, and Irian Jaya. Their strength also depends on where the land to which they relate is situated. Individual rights are less likely to be subject to communal control when they exist in agricultural fields not subject to wet rice-farming.⁴⁹ Communal controls are more likely to exist in situations involving wet rice-farming, village housing, and religious land.

Traditionally, these community controls over individual rights are said to

2, at 49-74.

45. See, e.g., CLIFFORD GEERTZ, *NEGARA: THE THEATRE STATE IN NINETEENTH CENTURY BALI* 47-48 (1980); WARREN, *supra* note 19, at 1; J. Breman, *The Village in Java and the Early Colonial State*, J. PEASANT STUD., July 1982, at 189-240.

46. The inappropriateness of applying Western terminology to Indonesian *adat* has been well described. See TER HAAR, *supra* note 2, at 224-28 (discussing inexact correlation with Dutch Indonesian terminology); 1 THE LAWS OF SOUTH EAST ASIA 3 (M.B. Hooker ed., 1988). But cf. John Griffiths, *The Division of Labour in Social Control*, in TOWARD A GENERAL THEORY OF SOCIAL CONTROL 37, 37-38 (Donald Black ed., 1984) (critiquing approaches that regard law as being "a folk concept, suitable only for use within an internal perspective by the participants in a given system" of social control).

47. Rights to possess are generally available only to community members; outsiders gain rights of use only, for which they must pay recognition money (*recognitie*). Pledges are the basic form of *adat* security. The right of priority to buy is generally available only to neighbors. See SALINDEHO, *supra* note 38, at 276; see also TER HAAR, *supra* note 2, at 95-97 (discussing nature of individual possessory rights).

48. For example, in Aceh, clearing and cultivating virgin land (that is, uncultivated lands outside the agricultural fields—*padang*—surrounding a village) leads to individual rights of ownership subject only to community rights of grazing in a noncrop season and neighbors' rights of first option to purchase. In Central and East Java, individuals may hold short term usufructuary rights to cultivate, but these are predicated on observance of *adat* rules, including community rights to graze animals when land is fallow. In Minangkabau, temporary, noninheritable cultivation rights are allocated to individual subclan members from larger subclan-held usufructuary rights. See VAN HOLLEMAN, *supra* note 21, at 97-98, 150, 138.

49. Wet rice-farming requires a great deal of community cooperation, particularly in irrigation.

be embodied in the overarching community right of disposal known by Dutch scholars as *beschikkingsrecht* and by Indonesian lawyers as *hak ulayat*.⁵⁰ *Hak ulayat* has two basic features.⁵¹ The first is the way in which the relationship between an individual community member's right to land and the community's right of disposal turns on an ebb and flow of commitment and obligation. That is to say, the more work and capital that an individual puts into a piece of land, the greater the community's recognition of the individual's particular right to it;⁵² the less work put into a piece of land by an individual, the more likely that the community will exercise its overarching right to reallocate the land for another member's use.⁵³

The second feature is that the transfer of rights, whether to outsiders or between individual community members, is subject to strict community control. At most, outsiders can obtain limited rights of use to land only with

50. Van Vollenhoven first coined the description "right of disposal" (*beschikkingsrecht*) in his text *MISKENNINGEN VAN HET ADATRECHT* 19ff (1909), cited in TER HAAR, *supra* note 2, at 81. The term *hak ulayat* is used in the Minangkabau region of West Sumatra; different terms are used in other areas. For a listing of terms used in other regions, see SALINDEHO, *supra* note 38, at 277; TER HAAR, *supra* note 2, at 91. This Article uses the term *hak ulayat* as a compendious reference to the community right of disposal, but the degree of parity between the various terms similar in meaning to *hak ulayat* needs to be treated with some caution. See, e.g., Burns, *supra* note 24, at 95-97. For example, the study by Koesnoe of Lombok *adat* law concluded that *hak ulayat* as defined by Van Vollenhoven did not in fact exist on that island. See KOESNOE, *supra* note 40, at 87. Similarly, Vargas's study of the shifting cultivation *adat* law of the Dayak of Kalimantan concluded that not all of the elements of *hak ulayat*, again, as defined by Van Vollenhoven, were satisfied by the community's right of disposal known in the village of Jonggon. See Donna Mayo Vargas, *The Interface of Customary and National Land Law in East Kalimantan, Indonesia 128-29* (1985) (unpublished Ph.D. dissertation, Yale University) (on file with author).

51. See GAUTAMA & HORNICK, *supra* note 1, at 73-74; VAN HOLLEMAN, *supra* note 21, at 180. For a detailed account of Van Vollenhoven's development of the notion of an archipelago-wide community right of disposal, see Burns, *supra* note 24, at 8-29.

52. The acquisition of *adat* rights to land echoes Lockean theory, particularly Locke's argument that individuals acquire certain natural rights in property to which they have committed labor or capital. See JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* 285-302 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). However, *adat*'s vision of the proper function of government and civil institutions differs from Locke's. Locke believed that social institutions existed to protect the natural property rights of individuals; in contrast, traditional *adat* considers that individual property rights are not so much inherent and natural, but rather flow from the community's recognition that an individual has expended labor on a piece of land. In other words, although there are elements of natural rights philosophy in *adat*, ultimately *adat* "rights" are socially constructed and do not possess a natural inviolability. This understanding supports this Article's argument that, in the context of contemporary Indonesia, amalgamating *adat* principles into formal law is fraught with difficulty. See Walton H. Hamilton, *Property According to Locke*, 41 *YALE L.J.* 864 (1932) (discussing inviolability in Lockean notions of property).

53. See Maria Rita Ruwastuti, *Hak Ulayat Masyarakat Hukum Adat [Community Right of Disposal, Community Customary Law]* 5 (1988) (unpublished mimeograph, Kerjasama Pendidikan Hukum Masyarakat) (on file with author); see also SALINDEHO, *supra* note 38, at 282; TER HAAR, *supra* note 2, at 81-84. Another tempting parallel between *adat* and Western legal thought is in the common law's emphasis on possession as the basis of ownership. See F.W. Maitland, *The Mystery of Seisin*, 2 *LAW Q. REV.* 481 (1886). In the common law, taking lawful possession of land imparts rights to that land that may only be extinguished by the owner or by abandonment. See F.W. Maitland, *The Beatitude of Seisin*, 4 *LAW Q. REV.* 286, 290, 299 (1888). A similar situation may be posited in *adat* if the community is viewed as having ultimate ownership or sovereignty in local lands. This could explain why an occupier's rights can be extinguished by an *adat* community. However, this is an imperfect comparison. First, unlike in the common law, the *adat* community "owner" does not have a general right to extinguish individual possessory rights in land subject only to the passing of time. Instead, the community can only extinguish such "rights" in the event of abandonment or other serious *adat* wrongs. Second, and more fundamentally, the interaction between a community and its members in *adat* is far more fluid and complex than can be adequately explained by a common law rights analysis.

the consent of the community and on the payment of "recognition money" (*recognitie*). Similarly, community members generally can only acquire rights to land from other community members with the consent of the community or its heads.⁵⁴

Colonial scholars considered that *hak ulayat* existed throughout the archipelago, save for the islands of Flores and Banggai.⁵⁵ The extent to which *hak ulayat* persists in modern times has not been the subject of systematic research.⁵⁶ There is some recent evidence that it continues to exist in places as disparate as Aceh,⁵⁷ Ambon,⁵⁸ West Sumatra,⁵⁹ and Irian Jaya.⁶⁰ However, one Indonesian commentator states that it has ceased to exist in Madura, Bawean, and the wet ricefields (*sawah*) of Bali.⁶¹ It also appears largely to have disappeared in urban areas and many parts of Java. The consequences of this erosion of *hak ulayat* are considered further below.

2. Other Communal Rights

Hak ulayat apart, individual rights to use or possess *adat* lands are also commonly subject to obligations to provide voluntary labor to the community,⁶² communal rights of free passage and grazing in noncrop seasons,⁶³ communal rights to excise land or redive fields to accommodate an increased population,⁶⁴ communal restrictions on changes of use, and neighbors' rights of first option to purchase in the event of alienation.⁶⁵ In some areas, maintenance of *adat* rights to land is also tied to performance of fundamental ritual and ceremonial obligations.⁶⁶

54. See Ruwastuti, *supra* note 53, at 5; TER HAAR, *supra* note 2, at 86-88. As to the inalienability of the traditional Javanese right to cultivate communal land, see Erman Rajagukguk, *Agrarian Law, Land Tenure and Subsistence in Java: Case Study of the Villages of Sukoharjo and Medayu* 132-33 (1988) (unpublished Ph.D. dissertation, University of Washington) (on file with author) (discussing Judgment of Oct. 10, 1956 (*Desa Sukorejo v. Kasim*), Dec. No. 32K/Sip/1956 (Indon.) (upholding customary rule that communal land could only be used by village residents)).

55. See TER HAAR, *supra* note 2, at 82; cf. Burns, *supra* note 24, at 7 (arguing that it is inaccurate to describe variety of communal rights to land in Indonesia in terms of archipelago-wide right of disposal).

56. See H. Darmawi, *Land Transactions Under Indonesian Adat Law*, 3 LAWASIA 283, 283-85 (1972).

57. See T.I. El Hakimy, *Land Ownership in Rural Areas in Aceh (At the Village of Leupung in Greater Aceh District)* 30-32 (1980) (unpublished mimeograph, Syiah Kuala University, Darussalam, Banda Aceh) (on file with author).

58. See Franz von Benda-Beckmann & Tanya Taale, *Land, Trees and Houses: Changing (Un)Certainties in Property Relationships on Ambon*, Paper Presented at Northern Territory University (1993) (unpublished manuscript, on file with author).

59. See VON BENDA-BECKMANN, *supra* note 19, at 147; Herman Sihombing, *Preparing Indonesia's National Civil Law Which Is Based on Adat Law* (1980) (unpublished mimeograph, University of Andalas, Padang) (on file with author).

60. See Rajagukguk, *supra* note 54, at 59-60.

61. See SALINDEHO, *supra* note 38, at 284-85.

62. See M. SUASTHAWA, *STATUS DAN FUNGSI TANAH ADAT BALI [THE STATUS AND FUNCTION OF CUSTOMARY BALINESE LAND LAW]* 41 (1987) (discussing examples from Bali); Rajagukguk, *supra* note 54, at 123 (providing examples from Java).

63. See VAN HOLLEMAN, *supra* note 21, at 186.

64. See *id.*

65. See *id.* at 186-87.

66. See WARREN, *supra* note 19, at 42-44.

D. *The BAL*1. *Unification*

The BAL seeks to achieve its objectives of legal unity and certainty by converting all Western rights, and most *adat* rights, into a range of new statutory rights as of September 24, 1960. Thus, the BAL right of ownership known as *hak milik* subsumes: a) the Western *eigendom* right of ownership, the native proprietary right of *agrarische eigendom*, and the Oriental right of *landerijen bezitsrecht*;⁶⁷ b) *adat* rights equatable to ownership, such as *hak atas druwe*, *yasan*, *andarbeni*, and *pesini*, as well as “other rights resembling these”;⁶⁸ and c) the *adat* possessory rights of *gogolan*, *pekulen* and *sanggan*, “and other rights resembling these,” so long as they have “a permanent quality.”⁶⁹

Where these possessory rights do not have “a permanent quality,” they are subsumed by the statutory right of use known as *hak pakai*.⁷⁰ *Hak pakai* also subsumes Western rights of use, such as *vrechtgebruik* and *gebruik*,⁷¹ and other usufructuary *adat* rights including *annggaduh*, *bengkok*, *lungguh*, and *pitugas*.⁷²

2. *Western Characteristics of the BAL*

The new rights established by the BAL are Western in nature.⁷³ Thus, *hak milik* is unlimited in time and capable of being registered,⁷⁴ transferred,⁷⁵ and mortgaged.⁷⁶ It is the “strongest and fullest” right to land

67. See BAL, Conversion Provisions, arts. 1, 2.

68. See *id.* arts. 2, 7. *Hak atas druwe desa* is a Balinese right of ownership discussed in the BAL. *Yasan* is a Javanese individual right of ownership sometimes subject to a prohibition on alienability. See Rajagukguk, *supra* note 54, at 52.

69. See BAL, art. 7. *Gogolan* is the Javanese right of permanent use based on cultivation; *pekulen* and *sanggan* are Javanese rights to use communal lands. See Rajagukguk, *supra* note 54, at 123, 134, 136. A curious feature of the conversion of *pekulen* is that pre-BAL court decisions confirmed it as a right that reverts to the village when its holder dies. See *id.* at 22, 133 (discussing Judgment of the Supreme Court (Darmosewojo v. Brotodirjo), Dec. No. 340 K/Sip/1959 (Indon.) (holding that father’s land reverted to village rather than to heirs after his death)). Therefore, it is difficult to see how it can ever be of a permanent quality.

70. See BAL, art. 7. The Minister of Agrarian Affairs is to resolve any uncertainty as to whether *gogolan*, *pekulen*, and *sanggan* rights in question are temporary or permanent. See *id.* art. 7, para. 3. The statutory right of use is a right to use another’s land for a fixed period of time, usually for the purposes of agriculture or building. It may not be sold or otherwise transferred. See Rajagukguk, *supra* note 54, at 55 n.102.

71. See BAL, art. 6. For the incidents of *gebruik*, see *supra* note 12.

72. See BAL, art. 6. *Annggaduh* is a tenancy of arable land granted in return for a loan of money; *bengkok* is a right of use granted to village officials; *lungguh* is an apanage granted to imperial officials of Mataram. See VAN HOLLEMAN, *supra* note 21, at 191; Rajagukguk, *supra* note 54, at 128. Finally, the BAL right of commercial exploitation known as *hak guna usaha* subsumes Western rights of commercial lease (such as *erfpacht*) and concession (*hak konsesi*). The right to use buildings known as *hak guna bangunan* takes the place of Western lease rights over houses (*opstal* and *erfpacht*). See *id.* at 56.

73. See Mary F. Hiscock & David F. Allan, *Law Modernization in South-East Asia*, 46 RABELSZEITSCHRIFT 509, 526 (1982).

74. See BAL, arts. 19, 23; see also Government Regulation No. 10, 1961 L.N. 28 (Mar. 23) (Indon.) (concerning land registration).

75. See BAL, arts. 20, para. 2, 24, 27, 49, para. 3.

76. See *id.* art. 25.

under the BAL,⁷⁷ and may be the source, therefore, of secondary rights such as use (*hak pakai*),⁷⁸ building (*hak guna bangunan*),⁷⁹ and lease (*hak sewa*).⁸⁰ Only Indonesian nationals⁸¹ and corporate bodies sanctioned by the state may hold *hak milik*.⁸² Similarly, the BAL rights of exploitation (*hak guna usaha*), use, and building are also capable of being registered,⁸³ transferred,⁸⁴ and, save for the right of use, mortgaged.⁸⁵ These rights are limited to Indonesian nationals, foreigners, and corporate bodies sanctioned by the state.⁸⁶

Registration of rights under the BAL is conducted through a combination of systematic and sporadic arrangements.⁸⁷ Systematic registration is in the process of being conducted from village to village by committees made up of local officials.⁸⁸ Sporadic (or voluntary) registration may be made at any time, but is mandatory whenever a registrable title is the subject of "transfer."⁸⁹

3. *Adat Features of the BAL*

With the notable exception of Hooker,⁹⁰ most commentators state that these "Western" attributes of the BAL's rights are offset by a number of *adat*-

77. *See id.* art. 20, para. 1.

78. *See id.* arts. 41, para. 1, 43, para. 2.

79. *See id.* art. 37, para. 2.

80. *See id.* arts. 44, 53.

81. *See id.* arts. 9, paras. 1-2, 21.

82. These bodies do not include *adat* communities. The government came closest to allowing registration of *adat* community rights in 1961 when it allowed certain corporate bodies, including "social organizations" approved by the Minister of Agrarian Affairs in consultation with the Minister of Social Welfare, to register ownership rights. An *adat* village or kinship grouping may be such an appropriate social organization; however, it appears that neither ever has been approved as such.

83. *See* BAL, arts. 32, 38. Rights to use on state land must be registered in accordance with Regulation of the Minister of Agrarian Affairs No. 1 of Jan. 5, 1966 (Indon.). Rights of use on privately owned land need not be registered; however, they may be noted on the certificate of title. *See* Government Regulation No. 10, 1961 L.N. 28 (Mar. 23) (Indon.) (concerning land registration).

84. *See* BAL, arts. 28, para. 3, 35, para. 3, 41, 43.

85. *See id.* arts. 35, 39, 57.

86. *See id.* arts. 30, 36, 42.

87. The system of registration is governed principally by Government Regulation No. 10, 1961 L.N. 28 (Mar. 23) (Indon.) (concerning land registration). However, a number of other regulations are also relevant. *See* Regulation of the Minister of Agrarian Affairs No. 2, 1960 Tambahan Lembaran Negara 2086 [hereinafter T.L.N.] (Oct. 19) (Indon.); Decree of the Minister of Internal Affairs of May 14, 1970, No. Sk 26/DDA/1970 (Indon.); Presidential Decree No. 32 (1980) (Indon.). The registration process has two parts: First, *hak milik* and subsidiary rights are registered; second, a certificate of title is issued. For the sake of convenience, this Article uses the term "registration" as a compendious reference to both of these processes.

88. The committee determines the boundaries of particular land-holdings, the nature of rights to that land, and the identity of the holders of those rights. Any disputes concerning the matters covered by the registration map are to be settled, in the first instance, by conciliation under the supervision of the committee. If the dispute remains unresolved after conciliation, the parties are advised to submit the matter to the courts. *See* GAUTAMA & HARSONO, *supra* note 14, at 93.

89. *See* BAL, art. 19. For an analysis of Government Regulation Number 10 that enacted parts of this aspect of the BAL, *see* GAUTAMA & HORNICK, *supra* note 1, at 92-100. Transfer in this context appears to include transfer by inheritance. *See id.* at 46-47. However, a failure to register does not invalidate the transaction itself. *See id.* at 53-55.

90. *See* HOOKER, *supra* note 29, at 22, 117-20.

based features of the BAL.⁹¹ One such feature is the somewhat curious statement in the Explanatory Memorandum that the BAL's rights are "based upon *adat*." Another is the statement in article 6 that all rights to land have a "social function."⁹² This concept is said to reflect principles of *adat* law,⁹³ in particular, the notion discussed above that "rights" to land are always constrained by the needs and processes of local groups.⁹⁴ The practical effect on modern Indonesian land law and administration of this formal adoption of the social function principle is considered below.⁹⁵ Another important notion is the statement in the Explanatory Memorandum that the new land law of Indonesia arising out of the BAL will be "based on *adat* law."⁹⁶ The truth of this proposition is considered below.

Essentially, these *adat* features of the BAL draw upon the colonial view of ter Haar and Van Vollenhoven that unification of Indonesian law would be possible only if it were based on universal *adat* principles distilled from long and careful study of *adat* rules.⁹⁷ Thus, leading Indonesian commentators interpret the BAL as retaining, in the long term, many general principles of *adat*, but not necessarily diverse local *adat* rules.⁹⁸ However, this position is complicated, at least in the short term, by article 5 of the BAL, which states that *adat* land law is "the agrarian law of Indonesia" insofar as it is consistent with national unity, the interests of the state, and the provisions of the BAL itself.⁹⁹ This appears to mean that local *adat* rules will remain valid

91. See, e.g., GAUTAMA & HARSONO, *supra* note 14, at 23; BOEDI HARSONO, HUKUM AGRARIA INDONESIA [INDONESIAN AGRARIAN LAW] 2 (5th ed. 1994); MACANDREWS, *supra* note 13, at 75; A.P. PARLINDUNGAN, KOMENTAR ATAS UNDANG UNDANG POKOK AGRARIA [COMMENTARY ON THE BAL] 51 (1993); SALINDEHO, *supra* note 38, at 239.

92. This statement also appears in article 33 of the 1945 Constitution. INDON. CONST. (Constitution of 1945) art. 33.

93. See PARLINDUNGAN, *supra* note 91, at 59–63. However, the use of the phrase "social function" derives from a series of lectures by Leon Duguit in 1911, in which he argued that the notion of property ownership was not the subjective right of the owner but the social function of the holder of wealth. It is notable that Duguit particularly emphasized the obligation of holders of land to increase the general wealth by making their land productive. See LEON DUGUIT, LAS TRANSFORMACIONES GENERALES DEL DERECHO PRIVADO DESDE EL CODIGO DE NAPOLEON [GENERAL TRANSFORMATIONS OF THE PRIVATE LAW SINCE THE NAPOLEONIC CODE] 141 (1912), cited in ROBERT CASAD & ROGELIO MONTAGNE, EXPROPRIATION IN CENTRAL AMERICA AND PANAMA: PROCESSES AND PROCEDURES 2–3 (1975). For a discussion of the large amount of land left vacant in Indonesia for speculative purposes, see *infra* note 171 and accompanying text.

94. The concept of social function is interpreted in the Explanatory Memorandum to mean that individual rights must be balanced against the interests of the community. See BAL, Explanatory Memorandum, General Elucidation, pt. II, para. 4; see also R. Supomo, *The Future of Adat Law in the Reconstruction of Indonesia, in SOUTHEAST ASIA IN THE COMING WORLD* 217, 231 (Philip W. Thayer ed., 1957) ("Above all, the right of ownership should not be understood in a Western liberalistic sense, but the social function must be primarily emphasised in accordance with *adat* concepts.").

95. See *infra* Subsection III.D.1.

96. GAUTAMA & HARSONO, *supra* note 14, at 24.

97. See Lev, *The Lady*, *supra* note 1, at 284 n.3; see also Burns, *supra* note 24, at 9 (arguing that this view was romanticized and that no genuinely universal *adat* principles exist, at least none sufficiently concrete to found legal unification); *supra* note 43 and accompanying text.

98. See GAUTAMA & HARSONO, *supra* note 14, at 24.

99. See BAL, art. 5; see also HOOKER, *supra* note 29, at 114–24; *infra* Part II. This provision generally reflects the post-Independence approach to unification of Indonesian law, namely that it "must be based on *adat* law which does not hamper the promotion of a just and prosperous society." Statement of the Indonesian Provisional People's Congress (MPRS No. 11/1960), quoted in HOOKER, *supra* note 29, at 27.

until the underlying rights are registered, so long as the interests of national unity and the state do not dictate otherwise. In sum, the BAL purports to base itself on universal *adat* principles, including the principle that rights to land have a social function, and retains local *adat* rules only to the extent that they are consistent with registered titles, national unity, and the interests of the state.

E. Communal Rights Under the BAL

1. Hak Ulayat

One way to test the BAL's assertion that modern Indonesian land law is to be "based on *adat* principles" is to consider the position of communal rights under the BAL. Significantly, *hak ulayat* is not converted into a statutory right. Article 3 states that it and "other rights resembling it" are recognized where they continue to exist, but that they must be adjusted to conform to the national interest.¹⁰⁰

Subsequent government policy has taken this notion to the extreme by treating all uncultivated *hak ulayat* land as land belonging to the state.¹⁰¹ The legal bases for this "state *hak ulayat*" policy are article 33(3) of the 1945 Constitution and article 3 of the BAL, both of which declare all land in Indonesia to be under the "control" of the state.¹⁰² Even though the Explanatory Memorandum expressly states that article 3 is not intended to replicate the colonial "domain theory," under which the Dutch Crown was said to own all land that was not *eigendom* or *agrarische eigendom* land,¹⁰³ the notion of state *hak ulayat* has enabled the state to grant rights to uncultivated *hak ulayat* land without obtaining the consent of the relevant local community and without triggering the legal obligation to pay "adequate" compensation to holders of expropriated titles.¹⁰⁴ This practice has occurred

100. See BAL, art. 3. In a similar vein, the Explanatory Memorandum suggests that *hak ulayat* has been an obstacle to regional development in the past. See *id.* Explanatory Memorandum, General Elucidation, pt. II, para. 3.

101. See Ruwiasuti, *supra* note 53, at 2-3; see also MACANDREWS, *supra* note 13, at 27; Rajagukguk, *supra* note 54, at 53-54; Sihombing, *supra* note 59, at 13-14.

102. See INDON. CONST. (Constitution of 1945) art. 33, para. 3; BAL, art. 3; see also BOEDI HARSONO, UNDANG UNDANG POKOK AGRARIA [THE BASIC AGRARIAN LAW] 166-69 (3d ed. 1970); Robert Hornick, *Indonesian Mortgage Law*, 5 LAWASIA 30, 33 (1974); Ruwiasuti, *supra* note 53, at 3. This policy is said to leave the traditional distributional role of the village chief in the hands of the President. See *id.* at 3.

103. See BAL, Explanatory Memorandum, General Elucidation, pt. II. This included *hak ulayat* land, although ownership may have been more formalistic than actual. See KEEBET VON BENDA-BECKMANN, THE BROKEN STAIRWAYS TO CONSENSUS: VILLAGE JUSTICE AND STATE COURTS IN MINANGKABAU 163 (1984). For a more extensive discussion of the domain theory, see GAUTAMA & HORNICK, *supra* note 1, at 79-81; MICHAEL BARRY HOOKER, A CONCISE LEGAL HISTORY OF SOUTH-EAST ASIA 188 (1978).

104. See BAL, art. 18; see also Law No. 20, 1961 L.N. 288, arts. 3, 5 (Sept. 26) (Indon.) (on release of title); *infra* Subsection III.D.1 (discussing *Kedung Ombo Dam Case*). Indeed, many aspects of the current operation of "state *hak ulayat*" echo the colonial infringements of *hak ulayat* so derided by Van Vollenhoven. See Burns, *supra* note 24, at 19-32.

most notably in relation to the granting of timber concessions,¹⁰⁵ the declaration of protected state forests,¹⁰⁶ and the allocation of land for transmigration projects.¹⁰⁷ Not surprisingly, it has given rise to a number of disputes as *adat* conceptions of rights to *hak ulayat* land have clashed with those of formal state law.¹⁰⁸

2. Other Communal Rights

Hak ulayat and its equivalents aside, the BAL does convert some traditional communal interests in land into statutory rights. For example, the Balinese village right of ownership (*hak atas druwe desa*) and the Minangkabau subclan right of use (*ganggam bantuak*) are converted respectively into statutory rights of ownership and use.¹⁰⁹ Equivalent communal *adat* rights are impliedly converted into appropriate statutory rights by virtue of the compendious references to "other rights resembling these" in the conversion provisions. In these circumstances, one might expect the government to have instituted some mechanism through which jural communities could register communal rights. However, the state has never formally provided for registration of this kind, whether in the name of the community or in the name of representatives or trustees.¹¹⁰ Nor has the state

105. See Government Regulation No. 21, art. 6, para. 3 (1970) (Indon.) ("[I]n an area where logging operations are being conducted within the scope of forest utilisation, the implementation of community rights to extract forest products shall be suspended."), translated in Marcus Colchester, *The Struggle for Land: Tribal Peoples in the Face of the Transmigration Programme*, ECOLOGIST No. 2/3, 1986, at 105. For a discussion of these issues and an outline of the environmental and economic benefits of recognizing local community rights in forest concession areas, see generally CHARLES ZERNER, LEGAL OPTIONS FOR THE INDONESIAN FORESTRY SECTOR (Ministry of Forestry Field Doc. No. V1-4, 1990).

106. See Basic Forestry Law, art. 17 (1967) (Indon.) ("Implementation of community rights, customary law . . . should not hinder the fulfillment of the aims referred to in this law."), translated in Colchester, *supra* note 105, at 105; see also Government Regulation No. 21, art. 6, para. 1 (1970) (Indon.) ("Rights of customary law communities and its members to extract forest products . . . shall be arranged in a proper order so as not to interfere with implementation of forest utilisation."), translated in Colchester, *supra* note 105, at 105.

107. See Basic Forestry Law: Clarification Act No. 2823, art. 17 (1967) (Indon.), translated in Colchester, *supra* note 105, at 105 ("The rights of traditional law communities may not be allowed to stand in the way of the establishment of Transmigration settlements.").

108. See MACANDREWS, *supra* note 13, at 58, 85; Sihombing, *supra* note 59, at 18-19. A typical example is the reported refusal of the Parbuluhan village in the Dairi Regency of North Sumatra to accept expropriation of its *hak ulayat* land for a commercial plantation. The land in question was named after the clan that inhabited it, and was perceived to be holy. See *Land-Love Strong Among Villagers*, JAKARTA POST, Mar. 15, 1995, at 1. An example of a transmigration dispute over *hak ulayat* land in Irian Jaya may be found in reports of the Skou tribe's discontent with the Rp 130,000,000 (approximately U.S. \$65,000) recognition money offered by the state for the use of almost 100,000 hectares of traditionally held tropical forest for transmigration purposes. See George J. Aditjondro, *Transmigration in Irian Jaya: Issues, Targets and Alternative Approaches*, PRISMA, Sept. 1986, at 72-73. For further details of transmigration disputes in Irian Jaya, see Colchester, *supra* note 105, at 99. For an example of a conflict between *hak ulayat* and a state logging concession, see *Land Dispute of the Dayak Bentian, Indigenous People of East Kalimantan*, 3 INDON. HUM. RTS. F. 19 (1992).

109. See BAL, Conversion Provisions, arts. 2, para. 1, 6.

110. See Interview with Lecturers in Land Law, at Udayana University, in Bali, Indonesia (Feb. 11, 1995); Interview with Bapak Bhudiawan, Lecturer in Land Law at Udayana University (Feb. 1, 1995) (notes on file with author). In addition, no Indonesian or English language text known to the author mentions the existence of any provision for registering statutory rights in the name of a traditional community or family group. For texts not referred to specifically in other parts of this Article, see H.

issued guidelines on associated issues, such as the rights of representatives or trustees, the legal status of lists of community members, or the resolution of intra-community disputes.¹¹¹

F. *The Incompatibility of Adat and the BAL*

1. *In General*

The Western nature of the BAL's rights, the unregistrability of *hak ulayat*, and the inability to register other communal rights all suggest that the BAL, at least as currently applied, is ultimately directed at the individualization of land tenure in Indonesia.¹¹² Many view such an imposition of Western-style tenure as a precondition for economic development.¹¹³ Some even claim that it is consistent with human rights.¹¹⁴ But it is clear that *adat* land law is cognizable only in the context of communal rights and obligations, which are underpinned by social processes

ABDURRAHMAN, KEDUDUKAN HUKUM ADAT DALAM PERUNDANGAN-UNDANGAN AGRARIA INDONESIA [THE POSITION OF ADAT LAW IN INDONESIAN AGRARIAN LEGISLATION] (1994); SUDARGO GAUTAMA, TAFSIRAN UNDANG UNDANG POKOK AGRARIA [COMMENTARY ON THE BAL] (9th ed. 1993); G. KARTASAPOETRA ET AL., HUKUM TANAH [LAND LAW] (2d ed. 1991).

111. For a detailed discussion of the problems and requirements of registering customary communal titles, see JACK KNETSCH & MICHAEL TREBILCOCK, LAND POLICY AND ECONOMIC DEVELOPMENT IN PAPUA NEW GUINEA 35-40 (Institute of Nat'l Affairs Discussion Paper No. 6, 1981). For a discussion of the way in which communally held titles are registered in Lagos, Nigeria, see S.R. SIMPSON, LAND LAW & REGISTRATION 230-33 (1976).

112. See HOOKER, *supra* note 29, at 118-20. It will be argued below, see *infra* notes 217-23 and accompanying text, that this process has not been counteracted by *adat* features of the BAL such as the principle of social function. See *supra* note 92 and accompanying text. For a useful discussion of a similar use of statutory law to hasten or induce individualization of land tenure in Kenya, see HOOKER, *supra* note 29 at 200.

113. See MACANDREWS, *supra* note 13, at 75; SIMPSON, *supra* note 111, at 226 (suggesting that in certain "circumstances it may prove necessary to replace customary law rather than wait for it to evolve"). These views owe an intellectual debt to the "tragedy of the commons" thesis, which holds that community ownership of resources leads to their unsustainable depletion. See Garrett Hardin, *The Tragedy of the Commons*, 3 SCIENCE 1243 (1968); see also RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 32-35 (4th ed. 1977) (discussing tragedy of commons thesis). This Article does not make an empirical contribution to this debate. However, it does assert that in relation to agrarian law, tragedy of the commons proponents fail to take into account the social dislocation and disputation that inevitably follow the imposition of individualized, registered titles on communally oriented, customary tenure. In addition, imposing individual titles on traditional communal tenure has the effect of bifurcating local practice and state law, which creates forum-shopping opportunities for parties to disputes and enhances the possibility of exploitative, state-backed development by outsiders contrary to the wishes of the local community. See *infra* Section III.A.

Finally, those who argue that communal ownership of resources leads to their unsustainable depletion fail to appreciate Indonesians' powerful cosmological beliefs, particularly their notion of equilibrium. These beliefs generate social cohesion, which helps prevent excessive depletion of resources by individual community members. Indeed, several other case studies suggest that this social cohesion actually encourages sustainable use of natural resources. See, e.g., David L. Miller, *The Evolution of Mexico's Spiny Lobster Fishery*, in COMMON PROPERTY RESOURCES: ECOLOGY AND COMMUNITY-BASED SUSTAINABLE DEVELOPMENT 185, 185-204 (Fikret Berkes ed., 1989); Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); Kenneth Ruddle, *Solving the Common-Property Dilemma: Village Fisheries Rights in Japanese Coastal Waters*, in COMMON PROPERTY RESOURCES: ECOLOGY AND COMMUNITY-BASED SUSTAINABLE DEVELOPMENT, *supra*, at 168, 168-84.

114. See, e.g., SALINDEHO, *supra* note 38, at 287.

of consensus, discussion, and deliberation. Individualizing and "freezing" tenure through a process of registering Western-style rights threatens to break down this subtle interaction between individuals and their community.¹¹⁵ In doing so, individual registration of land also threatens traditional village social structure itself, at least to the extent that this structure is based on communal and cooperative elements. As a result, rather than conferring legal unity and certainty, the registration of rights under the BAL is far more likely to lead to disputation,¹¹⁶ de facto pluralism, and ultimately the erosion of *adat* authority itself. This erosion will only accelerate as land acquires increased economic value under the pressures of industrialization, urbanization, and population growth.¹¹⁷

Notably, these unfortunate consequences have been identified in most developing countries that have sought to impose registered, individualized titles on customary, communal forms of tenure.¹¹⁸ In other words, where the land law on which title registrations are based is inconsistent with social reality, the much-touted benefit of registration—increased certainty that leads to increased investment and access to formal credit—does not materialize. Instead, registration engenders conflict and bifurcates local practice and state law.¹¹⁹ In turn, this bifurcation generates a vicious developmental cycle in which economic activity is neither instigated by local communities nor negotiated through them.¹²⁰ Instead, it is imposed from above in an ad hoc and discriminatory way by an alliance of bureaucracy and private commercial interests.

115. For a case study of title registration in Papua New Guinea and an assertion that the costs of social disruption may outweigh the benefits of registering individualized titles, see KNETSCH & TREBILCOCK, *supra* note 111, at 32–33. For a critique of the notion that traditional law is a barrier to development, see Franz von Benda-Beckmann, *Scape-Goat and Magic Charm: Law in Development Theory and Practice*, 28 J. LEGAL PLURALISM 129 (1989). For a general discussion of the incompatibility of customary law and individualized Western-style land law, see SIMPSON, *supra* note 111, at 224. Of course, it may be that over time *adat* property relationships will evolve in a way that better reflects the property concepts of Western law. See Franz von Benda-Beckmann & Keebet von Benda-Beckmann, *Property, Politics, and Conflict: Ambon and Minangkabau Compared*, 28 LAW & SOC'Y REV. 589 (1994).

116. In Papua New Guinea, for example, there were attempts from 1965 to 1970 to register systematically lands held under customary communal title with the assistance of demarcation committees composed of local landowners and leaders. These attempts failed largely because of disputes engendered by different groups fearing a freezing of claims. See KNETSCH & TREBILCOCK, *supra* note 111, at 10.

117. Simpson notes, for example, that the growth of individual dealing in customary land in Africa has led to prolonged litigation and much uncertainty, largely because the communal nature of rights to land operates as a very effective form of social insurance. He also notes that experiences in India, Burma, and the United States have shown that conferring rights of alienability on customary titleholders has led many to lose their traditional lands. See SIMPSON, *supra* note 111, at 236.

118. There are a number of countries that have faced these issues. See, e.g., KNETSCH & TREBILCOCK, *supra* note 111, at 10–11, 34–40 (analyzing Papua New Guinea); David A. Atwood, *Land Registration in Africa: The Impact on Agricultural Production*, 18 WORLD DEV. 659 (1990); R. A. Cramb & I. R. Wills, *The Role of Traditional Institutions in Rural Development: Community-Based Land Tenure and Government Land Policy in Sarawak, Malaysia*, 18 WORLD DEV. 347 (1990).

The only country that appears to have avoided these problems is Thailand, which, unlike Indonesia, had a long history of land titling, a well developed and settled law, and little remaining traditional tenure in nonforest areas. See A. F. Burns, *Land Titling—The Big Picture*, Paper Presented at Land Titling and Land Administration Regional Workshop, Bali, Indonesia (Nov. 11–12, 1993) 14–15 (unpublished manuscript, on file with author).

119. See *infra* notes 140–44 and accompanying text.

120. See *infra* Subsection III.D.2.

2. *Registration Case Studies*

The conflict created by title registration in customary land may be illustrated by Sihombing's account of attempts to register the *ganggam bantuk* right in the Minangkabau region.¹²¹ As noted above, the BAL expressly converted this usufructuary *adat* right into a statutory right of use.¹²² This right is held communally by traditional subclans under the supervision of the chief heir (*mamak kepala waris*). The death of a subclan member who has worked a particular piece of land does not lead to inheritance of the right to use that land by his or her heirs; instead, the right to allocate use remains in the hands of the subclan at all times. Minangkabau subclans have sought to overcome the lack of formal provision for registration of communal rights by allowing chief heirs to register *ganggam bantuk* land in their own names, while also enclosing a list of all the subclan's members in the registration papers. Sihombing reports, however, that subclan members have sometimes challenged these registrations, especially when their own names are omitted from the list of members. A notable aspect of these omissions is that they have tended to favor the immediate family of the chief heir at the expense of the subclan itself, thereby reflecting the Minangkabau's own general but contentious trend toward nuclear family affiliation.¹²³

This example suggests that the process of registration itself tends to sharpen and define social conflict.¹²⁴ A further example of this phenomenon is provided by Franz von Benda-Beckmann and Tanja Taale in their study of the village of Hila in Ambon.¹²⁵ The village governing council in Hila asserts a general community right of disposal over all uncultivated land in the higher parts of its territory. However, patrilineal clans in Hila, whose *adat* authority predates that of the council, claim some areas of this land exclusively for themselves. These competing claims are complicated further by the fact that planted crops on land are inherited bilaterally, while the land and wild trees on it are inherited patrilineally. As a result, crops and even individual trees may be owned by persons other than the owners of the land. Von Benda-Beckmann and Taale demonstrate that the conflicting versions of *adat* have coexisted in an open-ended, imprecise way—their respective influence ebbing and flowing with the social and political power of the protagonists. Understandably, the village is reluctant to disturb this complex skein of *adat* rights by confronting the difficult questions of ownership and boundaries that inevitably follow any attempt to register rights.

121. See Sihombing, *supra* note 59. Writing in 1979, Franz von Benda-Beckmann reported that very little land in the Minangkabau region had been registered under the BAL. See VON BENDA-BECKMANN, *supra* note 19, at 213.

122. See BAL, Conversion Provisions, art. 2.

123. See VON BENDA-BECKMANN, *supra* note 19, at 361–72 (discussing move to nuclear family affiliation in property matters).

124. See KNETSCH & TREBILCOCK, *supra* note 111, at 40 (discussing analogous situation in Papua New Guinea). These authors argue that the “very act of embarking upon a registration programme will provoke a host of otherwise dormant disputes.” *id.* For a discussion of the complexities of identifying which traditional group owns which land and what overlapping claims there may be in relation to that land, see SIMPSON, *supra* note 111, at 224.

125. See von Benda-Beckmann & Taale, *supra* note 58, at 19–20, 24.

3. Indonesian Government and World Bank Registration Programs

This potential for conflict between *adat* principles and the registration process of the BAL has received less attention than it deserves in current schemes to improve land administration in Indonesia. For example, the government's PRONA program, instituted in 1981 to accelerate the process of registration,¹²⁶ has concentrated on reducing the costs associated with systematic registration of land in urban areas, especially in Java.¹²⁷ In particular, whereas the original and prohibitive fee for systematic registration was one percent of the "local standard price" of the land, PRONA has replaced it with charges based on ad hoc assessments of the applicant's income.¹²⁸ Similarly, the World Bank's Land Administration Project will focus on reducing costs and committing resources to systematic registration. The World Bank project envisions a two-stage process. First, the project will attempt to register individual titles in Java and urban areas.¹²⁹ Second, the project will undertake pilot studies for registration of group titles in *adat* areas.¹³⁰ Essentially, the World Bank takes the optimistic view that title registration and an effective land market are the answers to Indonesia's land ills.¹³¹ It recommends reforming the BAL only "in the longer term," and even then it sees the BAL's problems as limited to its restrictions on land lease periods and ownership of land rights.¹³² As I shall argue below, the Bank's approach is far too simplistic, as it ignores serious problems of dispute resolution, *adat*-state bifurcation, widespread unlawful occupancy, and inequitable processes of development.

4. Dispute Resolution

Allowing registration of communal rights renders the BAL more consistent with *adat*, but, as the Minangkabau and Ambon case studies suggest, it will not create legal unity and certainty if it is unaccompanied by effective dispute resolution. Accordingly, the dispute-resolving ability of the committee conducting systematic registrations, and in particular that of the "two members of the Village Government" who sit on the committee,¹³³ is crucial to restore the objectives of the BAL. Yet village government for these

126. See Decision of Interior Minister No. 230 (1981). PRONA stands for Proyek Operasi Nasional Agraria (The Operational Project for National Land).

127. See MACANDREWS, *supra* note 13, at 60. See generally DJOKO PRAKOSO & BUDIMAN ADI PURWANTO, EKSISTENSI PRONA [THE EXISTENCE OF PRONA] (1985); SH. SUDJITO, PRONA (1987).

128. See MACANDREWS, *supra* note 13, at 87 nn.1-2.

129. See WORLD BANK, INDONESIA LAND ADMINISTRATION PROJECT: LOAN AND PROJECT SUMMARY 1-2 (on file with author).

130. See *id.* at 2.

131. See WORLD BANK, DOC. NO. 9591-IND, INDONESIA: LAND RESOURCES MANAGEMENT AND PLANNING at vi-x (Draft Report, July 26, 1991) (on file with author).

132. See *id.* at viii.

133. See Government Regulation No. 10, 1961 L.N. 28, art. 3, para. 3 (Mar. 23) (Indon.) (concerning land registration). Notably, a draft of the proposed new law on title registration similarly requires that the village chief (*lurah*), who is not a member of traditional *adat* authority, sit on the registration committee. However, it does allow the committee discretion to include an *adat* leader. See Draft Government Regulation on Land Registration of Jan. 2, 1966, art. 14, para. 5 (Indon.).

purposes is not traditional *adat* authority, which one might expect to have the best chance of effective dispute resolution. Instead, it is a committee established pursuant to the Law on Village Government, which created three sources of official village authority: the *lurah* (village administrator), the *kepala desa* (village head), and the *LKMD* (village governing council).¹³⁴ The *lurah*, originally a Javanese *adat* figure, is now a civil servant appointed by the governor.¹³⁵ The *LKMD* is also appointed by the governor, but on the advice of the district head.¹³⁶ The *kepala desa* receives a stipend from the government, but is elected by the villagers.¹³⁷ One commentator states that, in many cases, the *lurah* and *kepala desa* are younger men or women with little knowledge of local *adat* rules or particular *adat* rights.¹³⁸ Another commentator argues that the application of the Law on Village Government has caused conflict in Minangkabau, particularly where village governing councils have replaced *adat* councils. He states further that the strict application of the law will ultimately lead to the abolition of village *adat* society.¹³⁹

It seems clear, therefore, that the committee conducting systematic registration will be a state institution separated from local *adat* history and authority. Some conclusions about the resulting prospects of its ability to create legal unity and certainty in areas that remain subject to strong *adat* authority may be gleaned from Keebet von Benda-Beckmann's study of an analogous situation involving dispute resolution in Minangkabau.¹⁴⁰ Von Benda-Beckmann demonstrates that in a number of disputes the separation of *adat* and state dispute resolution agencies increased uncertainty by allowing de facto forum-shopping opportunities.¹⁴¹ She also demonstrates that the application of *adat* rules by state institutions diverged greatly from their operation in the *adat* context because these rules were applied without utilizing or even taking into account the *adat* processes from which they sprang.¹⁴² She concludes persuasively that determinations by state institutions rarely settle disputes in a definitive way, and are only one factor taken into account

134. See Law No. 5 (1979) (on village government); Colin MacAndrews, *The Structure of Government in Indonesia*, in CENTRAL GOVERNMENT AND LOCAL DEVELOPMENT IN INDONESIA 20, 25, 39 (Colin MacAndrews ed., 1986); see also WARREN, *supra* note 19, at 239-66; Sihombing, *supra* note 59, at 16.

135. See MacAndrews, *supra* note 134, at 39 n.24 (discussing Presidential Decision No. 28 of 1980).

136. See *id.*

137. See *id.* at 25.

138. See A.P. PARLINDUNGAN, BEBERAPA MASALAH DALAM UUPA [SOME PROBLEMS WITH THE BAL] 13 (1993).

139. See Sihombing, *supra* note 59, at 16; cf. *Social Injustice Threatens Unity*, JAKARTA POST, Apr. 15, 1994, at 2 (stating that Law on Village Government "has been long criticised by social scientists who call it a disaster"). For a detailed discussion of the Law on Village Government and the inappropriateness of its application in Bali, see WARREN, *supra* note 19, at 239-66.

140. See generally VON BENDA-BECKMANN, *supra* note 103.

141. See *id.* at 37-63. For a further example of the disassociation of village institutions and state courts in Lombok, see Fons Srijbosch, *Recognition of Folk Institutions for Dispute-Settlement in Lombok, Indonesia*, in PEOPLE'S LAW AND STATE LAW 331 (Antony Allot & Gordon R. Woodman eds., 1985).

142. See VON BENDA-BECKMANN, *supra* note 103, at 21-35; see also Herman Slaats & Karen Portier, *Legal Plurality and the Transformation of Normative Concepts in the Process of Litigation in Karo Batak Society*, in ANTHROPOLOGY OF LAW IN THE NETHERLANDS, *supra* note 22, at 217-40.

both by the disputants themselves and in the village at large.¹⁴³ If this analysis is applied to the process of systematic registration, it seems most likely that determinations made by either the committee conducting systematic registrations or by the appellate courts will not effectively resolve registration disputes.¹⁴⁴ Instead, because these determinations usually will be inconsistent with the flexible and communal property relationships of *adat*, they are likely to be unacceptable to *adat* law and authority, and, thus, to lead to disassociation and conflict between *adat* practice and state tenure. This is likely to be a particular problem in the context of rapid economic development, as state tenure is relied upon for economic activities not desired by local *adat* authority.

5. Indefeasibility

In these circumstances, proposals to confer indefeasibility on registered titles¹⁴⁵ are clearly misconceived. Indefeasibility may create a hollow certainty for the purposes of formal law, but it will exacerbate conflict between local practice and state tenure and lead to injustice whenever state agencies assist state titleholders to override *adat* titleholders. Indefeasibility also overlooks two other features of modern Indonesian land administration. First, corruption is persistently alleged to exist in the process of granting rights to land.¹⁴⁶ Second, it is not unknown for villagers to be unaware of proposals to register titles to land in their possession, even when that information is on display in the office of the *lurah* or *kepala desa* for the very purpose of allowing challenges by affected parties.¹⁴⁷ This latter phenomenon is often due to the facts that the modern "village," at least for formal legal purposes, can be very large, particularly in densely populated Java, and that the offices of the *lurah* and *kepala desa* are distanced from daily village life.¹⁴⁸ With regard to this first point, it is extraordinary to consider, for example, that before a dam was built in the Kedung Ombo area of Central Java in the late 1980s, 21,938 families inhabited only 33 "villages."¹⁴⁹

143. See VON BENDA-BECKMANN, *supra* note 103, at 106–11, 139–42.

144. See KNETSCH & TREBILCOCK, *supra* note 111, at 40 ("[P]ast experience has again shown, it is one thing to resolve land disputes on paper; it is quite another thing to persuade or compel all parties to respect their resolution thereafter."). This general problem is exacerbated in Indonesia by the lack of guidelines or general principles for resolving registration disputes, and by the fact that the Land Registry office sometimes refuses to follow court orders to rectify the register. See PARLINDUNGAN, *supra* note 91, at 97–98.

145. See MACANDREWS, *supra* note 13, at 75–76.

146. See WORLD BANK, *supra* note 129, at 1; *Reports on Human Rights Violations*, 3 INDON. HUM. RTS. F. 19 (1992); cf. *Guidelines Set for Repelita VI*, JAKARTA POST, Mar. 24, 1995, at 1 (discussing government attempts to decrease corruption in development).

147. See Interview with Head of Land Disputes Section of Jakarta's Legal Aid Organisation (LBH), in Jakarta (Feb. 15, 1995) [hereinafter Interview with Head of Land Disputes Section].

148. Thus, villages are divided further into neighboring associations (*rukun warga*) and household associations (*rukun keluarga*). See MACANDREWS, *supra* note 13, at 25.

149. See Erman Rajagukguk, *Law, Land, and the Natural Environment in the Kedungombo Greenbelt Area at the Central Javanese Village of Gilirejo*, 28 LAW & SOC'Y REV. 623, 623 (1994).

G. *Costs and Benefits*

In summary, the BAL is overly ambitious. Extending a system of registered tenure across an archipelago dominated by unwritten, communal customary laws is an immensely difficult task. To give it a Western-style, individualized cast brings serious risks—risks of delays, disputation, continuing de facto pluralism, ultimate erosion of traditional social structure, and uneven patterns of development. These problems mean that both the legal unity and the enhanced certainty that are supposed to result from registration of titles will not materialize.

III. THE NEW PLURALISM

While the BAL's overarching attempt to unify Indonesian land law through a title registration process runs its course, it contemplates that Indonesians will continue to be governed by *adat* law, albeit only by *adat* law that is consistent with national unity or with the BAL and other regulations.¹⁵⁰ The next section analyzes the extent to which this long-term interim arrangement serves the legal needs of Indonesians, particularly in relation to certainty, predictability, and access to the benefits of development. This analysis will illustrate the nature of the new pluralism in Indonesian land law.

A. *Disassociation and Erosion of Adat Authority*

The widespread nonregistration of land in Indonesia has been entrenched by complex legal requirements relating to the transfer of land. Government regulations provide that all land transfers must be conducted before a designated Land Deed Official, known as a PPAT, appointed by the Minister of Internal Affairs.¹⁵¹ If the land is unregistered, the transaction must be verified by the *lurah* or *kepala desa* and endorsed, with the aid of land-tax documents, by the subdistrict head.¹⁵² In addition, where the land is within the jurisdiction of a Land Registry Office, a letter is required from the LRO confirming that the land is indeed unregistered.¹⁵³ Finally, where the land is agricultural, as is most unregistered land in Indonesia, the consent of the Governor or Regional Head is necessary before the transfer can be

150. See BAL, art. 5; see also *id.* Explanatory Memorandum, General Elucidation, pt. III, para. 1 (Indon.).

151. See GAUTAMA & HARSONO, *supra* note 14, at 48–49 (discussing Government Regulation No. 10, 1961 L.N. 28, art. 19 (Mar. 23) (Indon.) (concerning land registration)).

152. See *id.* at 49 (discussing Government Regulation No. 10, 1961 L.N. 28, arts. 22, 25 (Mar. 23) (Indon.) (concerning land registration)). This involves, among other things, a request for "right conversion legalisation" being displayed at the offices of the *lurah*, subdistrict chief, and Land Registry Office at Regency level for a period of two months before the transaction can proceed. See Regulation of the Minister of Agricultural and Agrarian Affairs No. 2 of Sept. 1, 1962, as amended by Regulation of the Minister of Agrarian Affairs No. 2, 1964 T.L.N. 2626 (Jan. 6) (Indon.); SALINDEHO, *supra* note 38, at 155.

153. See GAUTAMA & HARSONO, *supra* note 14, at 49.

registered.¹⁵⁴ This process is slow, complex, and, above all, costly. Thus, many who conduct land transfers simply ignore these requirements. Such unregistered transactions are regarded as legally valid, but the local Land Registry Office is almost certain to refuse to provide a certificate on the basis of one.¹⁵⁵ Village heads are also expressly prohibited from verifying nonconforming land sales, and may be punished if they do.¹⁵⁶ As a result, nonconforming transfers beget further nonconforming transfers, and most *adat* communities continue to rely on the traditional authority of the *tuan tanah* (master of the land), or its equivalent, in order to verify land transactions.¹⁵⁷

Relying on *adat* authority to verify and record land ownership and transactions provided a measure of certainty in the past.¹⁵⁸ In modern times, however, for reasons of colonial history,¹⁵⁹ modern government policy,¹⁶⁰ and economic development itself,¹⁶¹ *adat* authority has ceased to function in urban areas and in many parts of Java.¹⁶² Instead, these areas are governed directly by state officials in accordance with the Law on Village Government. However, as a result of the delays, costs, and complexities discussed above,¹⁶³ these officials have not performed the verification role of *adat* authority. Consequently, there has been a notable increase in the

154. See *id.* at 50 (discussing Regulation of the Minister of Internal Affairs of Oct. 21, 1970, No. SK 59/DDA/1970, art. 2 (Indon.)).

155. See *id.* at 53.

156. See *id.* at 50 (discussing Government Regulation No. 10, 1961 L.N. 28, arts. 43, 44 (Mar. 23) (Indon.) (concerning land registration)).

157. For a discussion of the land supervisor (*tuan tanah*) and its equivalents, see TER HAAR, *supra* note 2, at 91-93. This reliance on *adat* authority has its risks. According to Salindeho, article 8 of the Regulation of the Minister of Agrarian Affairs No. 2 (1962) (Indon.) states that any transfer of ownership of *adat* lands without a request for verification of that right from the *lurah* or *kepala desa* will automatically lead to a five year right of use only, after which time the land will revert from the transferee back to the state. See SALINDEHO, *supra* note 38, at 157.

158. See TER HAAR, *supra* note 2, at 106-07 (discussing traditional dispute-prevention function of *adat* authorities).

159. For example, in the colonial period, *adat* authority in Java was affected significantly by manipulation of traditional social structures such as the "culture system" for economic purposes. See S. POMPE, *INDONESIAN LAW 1949-1989*, at 179 (1992). Paradoxically, in this period, villages became better defined units under the influence of the administrative needs of colonial government. See MACANDREWS, *supra* note 13, at 18-19. As to the effect of the VOC period on traditional social structure, see HIROYOSHI KANO, *LAND TENURE SYSTEM AND THE DESA COMMUNITY IN NINETEENTH-CENTURY JAVA 4* (Institute of Dev. Econ. Special Paper No. 5, 1977). The change from rotational to permanent cultivation in Java early this century eroded the traditional prohibition on alienation. See Rajagukguk, *supra* note 54, at 132. The Japanese occupation is also said to have eroded *adat* authority by making people less susceptible to orthodox social pressures. See Darmawi, *supra* note 56, at 307-08.

160. For example, the Law on Village Government has imposed an overlay of "official" local authority through which government actions affecting local communities are channeled. See *supra* Subsection II.F.4. Another example is the way in which the BAL requires the PPAT to take over *adat* authorities' traditional verification and recording role in relation to land transactions. See *supra* Section III.A. It appears also that the BAL's encouragement of individual tenure will contribute to the erosion of *adat* authority. See *supra* Subsection II.F.1.

161. The rapid increase in land values in many areas of Java and Sumatra, in combination with the BAL's lifting of the traditional prohibition on alienation of land to outsiders, has triggered the transfer of large amounts of land to persons not subject to local *adat* authority. These purchasers usually do not comply with the apparently unenforced requirement that land transferees reside in the same subdistrict (*kecamatan*). See MACANDREWS, *supra* note 13, at 37; Rajagukguk, *supra* note 54, at 134-38.

162. See PARLINDUNGAN, *supra* note 138, at 13.

163. See SALINDEHO, *supra* note 38, at 157.

number of basic disputes involving land.¹⁶⁴ For example, there are numerous reports of land being sold or certificates of title being issued without the consent either of their long-term occupiers or of others with competing claims to the land.¹⁶⁵

In the absence of verification by *adat* authority, the traditional bulwark against these disputes has been possession of land-tax documents known in Java as *kekitir* and in Bali as *pepel*. But many of these documents date back to surveys completed by the Dutch, and the chain of title through the generations understandably has become unclear. Thus, when a group of land-law lecturers at Udayana University, Bali, were asked why large tracts of land in the capital, Denpasar, remained unregistered, they replied that it was due not only to issues of cost but also to the difficulties of proving titles from *pepel* documents that predated World War II.¹⁶⁶ These documents are also subject to potential counterclaims that they are not proof of ownership for the purposes of the Land Registry Office. For example, the Jakarta City Administration stated in 1995 that land-tax documents will no longer be accepted as proof of title.¹⁶⁷ In addition, a number of Indonesian Supreme Court decisions have held that land-tax documents are not definitive proof of title to land.¹⁶⁸

Notwithstanding this erosion of *adat* authority in urban areas and in Java, it generally remains strong in rural areas outside Java, though it is increasingly affected by government authority. Indeed, reports of the death of *adat* may be premature. For example, in relation to the much-studied Minangkabau, both Franz and Keebet von Benda-Beckmann note that, though Dutch writers have since the 1920s reported or predicted that *adat* would collapse under the pressures of Islam, economic development, and urbanization, it in fact remains highly resilient today.¹⁶⁹ In addition, as noted previously, *adat* may continue to exist as a network of shared values and relationships notwithstanding the destruction of *adat* authority. In fact, in many areas it has become an expression of regional identity against the pervasive social, economic, and governmental influence of the Javanese.¹⁷⁰

B. Unlawful Occupancy

The deleterious effect on legal certainty that the erosion of *adat* authority in urban areas and in Java has caused is paralleled by the uncertainty present

164. See J. Verschueren, *Marind-anim Land Tenure*, in LAND TENURE IN WEST IRIAN 42, 56-58 (Special Edition of the New Guinea Research Bulletin, Australian National University, A. Ploeg ed., 1970) (discussing erosion of Marind-anim *adat* authority under colonial rule in Irian Jaya and subsequent disputation and conflict).

165. See Interview with Head of Land Disputes Section, *supra* note 147.

166. See Interview with Lecturers in Land Law at Udayana University, *supra* note 110.

167. See *Councillor Expresses Dismay over Girik Document Issue*, JAKARTA POST, May 30, 1995, at 3.

168. See, e.g., Judgment of Feb. 3, 1960, Supreme Court, Dec. No. 34 K/Sip/1960 (Indon.) (holding that good faith buyer of land was its owner even though land-tax documents stated that name of owner was husband of seller).

169. See generally von Benda-Beckmann & von Benda-Beckmann, *supra* note 115, at 606-07.

170. See *infra* 231-35 (assessing significance of these concerns for proposed reforms).

in the large tracts of newly settled areas in Indonesia. This new settlement has come about as a result of the widespread occupation of vacant urban and peri-urban land,¹⁷¹ former colonial plantation land, and former private estate land.¹⁷² Pursuant to the passage of the BAL, Government Regulation No. 51 of 1960 deals with these forms of "unlawful" occupation by allowing criminal proceedings in cases of unlawful occupation occurring after June 12, 1954.¹⁷³ Though efforts at peaceful resolution are to be attempted first,¹⁷⁴ Government Regulation No. 51 grants the Minister of Agrarian Affairs and regional authorities unrestricted rights to bring civil proceedings for eviction.¹⁷⁵ Most importantly, however, it does not allow for the acquisition of rights through uninterrupted adverse possession, even though this is the traditional means of acquiring *adat* rights to land.¹⁷⁶

It is arguable that the BAL sanctions this traditional way of acquiring rights to land because article 27 allows for termination of a right to land in the event of abandonment, and article 56 states that *adat* will continue to govern the acquisition of *hak milik* until regulations (as yet undrafted) are put into place. However, in practice, these provisions are applied only in areas of established *adat* authority, and the notion that new forms of *adat* authority may arise is not countenanced.¹⁷⁷ As a result, occupiers of abandoned or

171. Land speculation is a particularly profitable pursuit in rapidly growing urban areas of Indonesia. See MACANDREWS, *supra* note 13, at 85. For example, the Minister of Agrarian Affairs reported in August 1993 that 82% of all land allocated for industrial estates had been left undeveloped. See *President Orders Enforcement Plans on Land Appropriation*, JAKARTA POST, Aug. 13, 1993, at 1; see also *Jakarta Developers Buying More Land Than They Need*, JAKARTA POST, Apr. 16, 1992, at 3. These areas are being occupied rapidly as urban populations continue to increase at a rate of at least 4% a year. See MACANDREWS, *supra* note 13, at 58-77; see also *West Jakarta Has Most Slum Areas*, JAKARTA POST, Aug. 31, 1993, at 3. It is estimated that 30,000 hectares a year of agricultural land is being converted to nonagricultural use. See *Land Agency to Review Rule on Holding Size*, JAKARTA POST, Oct. 12, 1993, at 2.

172. See GAUTAMA & HORNICK, *supra* note 1, at 6 (discussing Law No. 1 (1958) (Indon.) (concerning liquidation of private estates)). In 1954, the Sukarno government estimated that, in Java, approximately 200,000 hectares of former plantation land had been occupied by 28,000 households; in Sumatra, 125,000 households had occupied former plantation land. See Rajagukguk, *supra* note 54, at 56. At one point, the Minister for Transmigration reported that there were 1.7 million families of forest squatters in 19 of Indonesia's 27 provinces. See *Integrated Plan on Transmigration Being Worked Out*, JAKARTA POST, Aug. 4, 1993, at 2. Occupants of former plantation and private estate land generally lack any formal rights as most of this land technically reverted to the state as a result of the liquidation of private estates in 1958 and the lapse of most rights to plantation land as of September 24, 1965. However, most, if not all, colonial holders of *erfpacht* rights did not seek to take up their new BAL rights. See BAL, arts. 9, paras. 1-2, 21; GAUTAMA & HARSONO, *supra* note 14, at 39.

173. See GAUTAMA & HORNICK, *supra* note 1, at 13-15 (discussing Government Regulation (in lieu of law) No. 51, 1960 L.N. 1598 (Dec. 14) (Indon.)).

174. See *id.* (discussing Emergency Law No. 8 (1954) (Indon.), elevated to the status of statute by Government Regulation (in lieu of law) No. 51, 1960 L.N. 1598 (Dec. 14) (Indon.)).

175. See *id.* (discussing Government Regulation (in lieu of law) No. 51, 1960 L.N. 1598, arts. 3, 5 (Dec. 14) (Indon.)).

176. See *supra* note 52 and accompanying text (discussing traditional means by which *adat* rights are acquired).

177. In some cases, *adat* rights acquired after 1960 may be registered as BAL rights through a process of "recognition," but this is a matter of administrative discretion rather than legal obligation. See MACANDREWS, *supra* note 13, at 31-32. For example, farmers that had been cultivating land near Tarumajaya village in the Bekasi region of West Java were evicted from the land without compensation on the basis that it was state *hak ulayat* land and that they had not acquired any rights to it through cultivation after 1960. See *Bekasi Regent Denies Illegal Land Deal*, JAKARTA POST, Apr. 3, 1995, at 3.

vacant land are subject largely to the ad hoc control of the bureaucracy, in particular to the license-granting powers of regional authorities.¹⁷⁸ For example, regional governors have discretionary powers to issue licenses to cultivate land to long-term unlawful occupiers.¹⁷⁹ These licenses may be transformed over time into statutory rights on further application to the Minister. Although the claims of long-term cultivators are intended to have priority,¹⁸⁰ one Indonesian commentator states that "speculators and manipulators" have taken advantage of the governors' power to issue licenses. Consequently, some licenses have no lands, some occupiers have no licenses despite being entitled to them, and some lands are subject to more than one license.¹⁸¹

C. Access to Credit

Another problem with the long-term nature of the continuing pluralism in Indonesia relates to access to credit. Formal Indonesian law recognises two securities, the *hypotec*, which originally applied only to pre-BAL Western land,¹⁸² and the *credietverband*, which originally applied only to pre-BAL Indonesian land.¹⁸³ A *hypotec* requires registration in the local land registry office with the relevant land certificate in order to be effective.¹⁸⁴ A *credietverband* requires similar registration in order to be effective against third parties. A *credietverband* over unregistered land remains effective *inter partes*, but banks rarely issue credit on the strength of one because of the

In another dispute, the farmers in question claimed that they had been living in the area long before a right of concession was granted in 1981 to a state-owned plantation company. That company did not use the land, but in 1988 it sold a right of ownership to the land to a private developer. Subsequently, the government threatened the farmers with eviction. See *Bogor Regency To Evict 500 Farmers in Cionas for Luxury Housing Project*, JAKARTA POST, Apr. 16, 1992, at 2.

It is also quite common for occupiers to be evicted even though they have been paying land tax on the land. For example, shopowners who had been paying land tax in Ruwasari Timor, Jakarta, had their houses and shops demolished without compensation in 1994 on the basis that the land in question was owned by the City Administration. See *Rawasari Timur Traders Will Get No Compensation*, JAKARTA POST, Oct. 25, 1994, at 3. Finally, in some cases, uninterrupted occupancy that predates 1960 is deemed not to lead to the acquisition of statutory rights. See, e.g., *Lesson for All Concerned*, JAKARTA POST, Oct. 15, 1994, at 4; *Military Chief, Rights Commission Visit Benhil Area*, JAKARTA POST, Oct. 13, 1994, at 3 (reporting Bendungan Hilir dispute in which some occupiers of state land had first arrived on land thirty-five years before and had paid land tax during that time).

178. Compensation is granted occasionally on a discretionary basis to evicted occupiers, but this is very infrequent. See MACANDREWS, *supra* note 13, at 61. For examples of evictions of occupiers of former plantation lands, see *500 Farmers in Cionas Given Notice To Leave by Bogor Regent*, JAKARTA POST, Apr. 22, 1992, at 2.

179. See PARLINDUNGAN, *supra* note 138, at 70-72 (discussing Law No. 1 (1961) (Indon.); Decree of Minister of Internal Affairs No. 38, art. 4(g) (1981) (Indon.)).

180. Before 1980, a number of regulations provided for rights to be issued to long-term cultivators of former Western land. See PARLINDUNGAN, *supra* note 138, at 70-72. Since 1980, however, this land has reverted to the state by virtue of Presidential Decision No. 32 of 1979, and long-term cultivators only have "priority" in relation to the issue of rights. See *id.* at 72.

181. See *id.* at 73. Parlindungan goes on to consider a number of press reports relating to abuses of the license-granting power. See *id.*

182. But see Regulation of the Minister of Agrarian Affairs No. 15 of Sept. 23, 1961 (Indon.) (concerning registration of *hypotec* and *credietverband*).

183. See *id.*

184. See GAUTAMA & HARSONO, *supra* note 14, at 84 (discussing INDON. CIV. CODE art. 1179).

difficulties of giving notice of rights to third parties. As a result, titleholders to unregistered land tend to rely on small-scale unofficial credit, which, for reasons of risk and monopoly power, is accompanied by high interest charges.¹⁸⁵ They also have access to governmental schemes for the provision of credit without security. These schemes, however, have not allowed for the initiation of development projects, as they are for specific, government-controlled purposes,¹⁸⁶ such as improving rice production. Moreover, they have been scaled down because of high levels of defaults.¹⁸⁷

D. *Development as a Legal Norm*

1. *The Kedung Ombo Dam Case*

A related area in which the legal needs of most Indonesians are not being served is the acquisition of land for development. In particular, there are both a lack of certainty and a lack of access to the benefits of development. Because most land is unregistered, because dealing with unregistered *adat* titles involves a significant degree of uncertainty, and because unregistered titleholders cannot use their titles as security to fund their own development projects, almost all development projects in Indonesia use the laws on the acquisition of land for development to obtain titles directly from the state. Ideally, these laws should enhance legal certainty, planning, and the efficient allocation of resources by clearly setting out the procedures for negotiation, acquisition, appeal, and the assessment of compensation. However, in Indonesia, the courts and the bureaucracy have subjugated these procedures to the overriding principle of "development." This may be illustrated by the *Kedung Ombo Dam Case*,¹⁸⁸ an important decision that also reveals the modern operation of the BAL's notion that all rights to land have a social function.

The case involved the 1975 Decree of the Minister for Internal Affairs on Release (*pembebasan*) of Title and the 1993 Presidential Decision on Procurement (*pengadaan*) of Title. Both of these laws allow for land to be acquired for development. Unlike the 1961 Law on Revocation (*pencabutan*) of Title, which mandates compulsory acquisition, these laws require discussion and deliberation (*mufakat dan musyawarah*) with titleholders, and

185. See PARLINDUNGAN, *supra* note 91, at 55–56. It appears that there is a great deal of unofficial credit in the Indonesian economy. See MACANDREWS, *supra* note 13, at 4, 116; see also Fons Strijbosch, *Credit Contracts on the Island of Lombok*, in ANTHROPOLOGY OF LAW IN THE NETHERLANDS, *supra* note 22, at 288, 288–305 (describing development and use of unofficial credit contracts on Lombok).

186. This approach is confirmed by the view of the Minister for National Development Planning that the state needs to be strongly interventionist in relation to development of the traditional sector. See *Two Strategies Suggested for Development*, JAKARTA POST, May 29, 1995, at 1.

187. See James Kern, *The Growth of Decentralized Rural Credit Institutions in Indonesia*, in MACANDREWS, *supra* note 134, at 101, 101–31. Even in the BIMAS program, borrowers of larger loans had to provide a letter from the Land Registry Office stating that registration was in progress. See MACANDREWS, *supra* note 13, at 38.

188. These submissions are summarized in the Appeal Court's judgment. Judgment of the Supreme Court (App. Ct.), Dec. No. 2263 K/Pdt./1991, at 102–08 (Indon.); Judgment of the Supreme Court (Rev. Ct), Dec. No. 650 PK/Pdt./1994, at 55–58 (Indon.).

their "acceptance" of the amount and form of compensation. They also require that compensation be based on the "local standard price" of the land and buildings.¹⁸⁹

The dispute arose out of a proposal in the early 1980s to construct, with the support of the World Bank, a large dam at Kedung Ombo in the Genengsari subdistrict of Central Java. Construction of the dam required the use of approximately 6127 hectares of land¹⁹⁰ inhabited by 5300 families.¹⁹¹ In 1987, the governor of Central Java declared that the titleholders had accepted his offer of compensation as required by the 1975 Decree on Release of Title. Accordingly, the Boyolali District Court ordered the transfer of the titleholders' land, buildings, and crops to the state. The dam gates were closed and the titleholders' land flooded. Fifty-four titleholders then brought an action in the district court at Semarang seeking nullification of the Boyolali District Court order, compensation for the acquisition, and damages for the unlawful flooding.¹⁹² Their principal submissions in the Semarang court, and on cassation in the Supreme Court of Indonesia, and on further review in the Supreme Court, may be divided into three parts.¹⁹³

The first part concerned the way in which the negotiations for compensation were conducted. The applicants adduced evidence that (1) the authorities had obtained thumbprints from illiterate titleholders without informing them that they were thereby agreeing to both the appropriation and the amount and form of compensation;¹⁹⁴ (2) the inhabitants of some areas (e.g., Boyolali and Grobongan) had never been included in the negotiations;¹⁹⁵ and (3) the head of the Boyolali District Court, the head of the local subdistrict (Kemusu), and a representative from the local social and political office had said during negotiations that those who did not accept the compensation offer would be imprisoned for three months or fined Rp. 10,000, and that ownership of their land and buildings would revert to the government without compensation.¹⁹⁶ On the basis of this evidence, the applicants submitted that the defendants had not adhered to the requirement of discussion and deliberation set out in the 1975 Decree.¹⁹⁷

The second part of the applicants' submissions related to the Central Java governor's declaration that agreement had been reached with the title holders. The applicants relied on evidence that some titleholders had continued to dispute the proffered compensation, for example, through delegations that petitioned the House of Representatives and the World Bank. They submitted

189. See Judgment of the Supreme Court (App. Ct.), Dec. No. 2263K/Pdt./1991 (Indon.), Summary of Submissions of the Parties, at 97-101 [hereinafter 2263 Summary Submissions] (translation on file with author); see also The Summary of the Respondents Submissions in the Review Court Judgment, Dec. 650, at 88-93.

190. See *id.*

191. See Rajagukguk, *supra* note 54, at 624.

192. See 2263 Summary Submissions, *supra* note 189, at 133.

193. See *id.*

194. See *id.*

195. See *id.*

196. See *id.*

197. See *id.*

that, in these circumstances, the governor could not declare that an agreement had been reached. Accordingly, the order from the Boyolali district court transferring the land, buildings, and crops of the titleholders to the state contravened the requirement of acceptance in the 1975 Decree.¹⁹⁸

The third part of the applicants' submissions related to the sufficiency of the compensation offered. The applicants relied on evidence that the amount of compensation was below the local public price, thereby contravening the 1975 Decree's stipulation that compensation be based on that price. The applicants also adduced evidence that the substitute land not only was smaller than the land taken away but was also rugged and contained lime, making it difficult to obtain water for irrigation.¹⁹⁹

The principal submissions in response by the defendants included the following:²⁰⁰ First, the applicants had not proven that they held any property rights to the land or buildings in question, as they lacked the appropriate certificates of title.²⁰¹ Second, compensation had been accepted for 5781.55 hectares of the 6127 hectares of land necessary for the project. The people who did not accept the compensation inhabited only approximately 345.45 hectares.²⁰² The applicants had been invited to discussions on the question of compensation, but had not attended. Therefore, in the context of the government's development drive, the land acquisition had been carried out on the basis of consensus and discussions and deliberations with the titleholders as required by the 1975 decree.

The lower court in Semarang rejected the applicants' claim without providing reasons for its decision.²⁰³ The High Court at Semarang District Court confirmed the lower court's decision.²⁰⁴ The applicants requested cassation of both of these decisions in the Supreme Court of Indonesia.²⁰⁵ In a decision dated July 28, 1993, the appeals court of the Supreme Court²⁰⁶ overturned the decisions of the Semarang courts and ordered that the flooded lands and buildings be compensated at a rate of Rp. 50,000 (approximately U.S. \$21) per square meter, and the crops at a rate of Rp. 30,000 per square meter.²⁰⁷ The court also ordered damages of Rp. 2,000,000,000 (approximately U.S. \$900,000) for the unlawful flooding.²⁰⁸ Essentially, the

198. *See id.*

199. *See id.*

200. *See id.* at 97-101.

201. *See id.*

202. *See id.*

203. *See* Judgment of Dec. 20, 1990, District Court of Semarang, Dec. No. 117/Pdt./C/1990/PN.Smg. (Indon.), *cited in* 2263 Summary Submissions, *supra* note 189.

204. *See* Judgment of Apr. 9, 1991, District Court of Semarang (High Ct.), Dec. No. 143/Pdt./G/1991/PN.Smg. (Indon.), *cited in* 2263 Summary Submissions, *supra* note 189.

205. *See* Cassation Application Deed No. 31/Pdt.Kasasi/1991.PN.Smg., *cited in* 2263 Summary Submissions, *supra* note 189. The power of the Supreme Court to hear cases on cassation is set out in article 10 of Law No. 14 of 1970 on the Powers of the Judiciary. Cassation in Indonesia has its ordinary meaning, that is, an appeal restricted to errors of law only. *See* H. M. RIDHWAN INDRA, *THE POWER OF THE INDONESIAN SUPREME COURT 2* (1994).

206. The appeals court consisted of the head of the appeals division of the Supreme Court, Z. Asikin Kusumah Atmadja, and two other judges, H. Am. Manrapi and R. L. Tobing. *See* Judgment of the Supreme Court (App. Ct.), Dec. No. 2263 K/Pdt./1991, at 135 (Indon.).

207. *See* 2263 Summary Submissions, *supra* note 189, at 133.

208. *See id.*

decision stated that the defendants had failed to comply with the 1975 Decree on release of title.²⁰⁹ In particular, (1) there had been insufficient discussion and deliberation with the titleholders,²¹⁰ (2) not all titleholders had accepted the government's proposal,²¹¹ and (3) monetary compensation had been insufficient because the poverty of the titleholders required that the compensation allow them to buy equivalent land or buildings.

The respondents sought a "review" of the appeals court's decision pursuant to Law No. 14 of 1985, which grants the Chief Justice discretionary power to review Supreme Court appeals court decisions.²¹² Although the review court²¹³ upheld this application on a number of grounds, three in particular were said to be sufficient in themselves to justify the decision.²¹⁴ The review court determined that the Boyolali District Court's orders transferring the applicants' rights to land, buildings, and crops to the state were valid because: (1) all rights to land have a social function, meaning that individual rights must succumb to the interests of the community in matters of public interest; (2) the Kedung Ombo dam was in the public interest; and (3) the law must support the process of national development,²¹⁵ as required by House of Representatives Law No. 111 of 1993, which the Supreme Court applied in similar circumstances in the *Mican Dam Case*.²¹⁶ Under these circumstances, it was not necessary for the court to consider whether the legislative requirements of discussion and deliberation and acceptance by the titleholders had been satisfied.

2. *Ad Hoc Bureaucratic Control of Land*

In other words, the court in *Kedung Ombo* elevated the principles of social function and development to the status of legal norms that override

209. See *supra* text accompanying note 189.

210. Although the committee is not expressly required to conduct negotiations on the traditional Indonesian principle of discussion and deliberation, it must "be guided by regulations that are based" on that principle. See BAL, art. 1, para. 3.

211. If the titleholders do not accept the amount or form of the compensation, the committee may maintain its decision or submit the matter for resolution by the Governor. See BAL, art. 8, para. 1. The Governor has the power to confirm the committee's decision or make a different decision "shaped by finding a middle way that is acceptable to the two parties." See *id.* art. 8, para. 2. It is notable that the Governor is not given the power to compel titleholders to accept the compensation offered or to order them from their lands or buildings in the event of continuing disagreement. That power remains vested exclusively in the President by virtue of article 1 of the 1961 Law on Appropriation.

212. See Law No. 14, arts. 67-72 (1985) (Indon.) (on the powers of the judiciary). Unlike cassation, a "review" is not limited to consideration of errors of law. See INDRA, *supra* note 205, at 3. Himawan points out that disgruntled litigants in the Supreme Court almost invariably apply to the Chief Justice for a review, thereby creating a de facto court of appeal never intended under the original three tiered system. See Charles Himawan, *How Not To Intervene in a Judicial Process*, JAKARTA POST, May 16, 1995, at 1.

213. The review court consisted of Chief Justice H. R. Purwoto S. Gandasubrata and four other judges: H. Soejono, H. Samsuoddin Aboubakar, Olden Bidara, and Sarwata. See Dec. No. 650 PK/Pdt./1994, at 101 (Indon.).

214. See Judgment of the Supreme Court, Dec. No. 650 PK/Pdt/1994, at 98 (Indon.).

215. See *id.* at 96-97.

216. See Judgment of July 19, 1990, Supreme Court, Dec. No. 135 K/Pdt./1989 (Indon.).

otherwise applicable legislation or regulations.²¹⁷ The malleability of these principles means that legal justification can almost always be found, even *ex post facto*, for ad hoc bureaucratic actions in relation to land. This entrenches a vicious cycle in Indonesian development, in which unregistered occupiers of land cannot obtain credit to initiate their own development, and private developers eschew the uncertainties of dealing with them in favor of expropriating land through collusion with regional authorities. In these situations, the compensation offered is usually well below market price.²¹⁸ This process may be convenient and lucrative for regional authorities, but it leads to a high level of conflict with local communities and threatens to create long-term disruption of development projects.²¹⁹ It also means that land is not chosen for its economic utility to the project, but rather because the inhabitants lack the sociopolitical power to prevent its expropriation. In short, the modern operation of Indonesian land law and administration is not, as purported by the BAL, "based on *adat* principles."²²⁰ In fact, the perverse modern result of the BAL's adoption of *adat* concepts is that those principles, in particular that of social function, have served simply as legal cover for arbitrary and inequitable bureaucratic control of land administration.²²¹

E. *The Role of the Courts*

All this is not to say that the BAL's adoption of *adat* concepts was a cynical exercise from the outset. The intention of the BAL appears to have been that the State would develop the BAL's *adat* features over time to counteract its Western attributes, and thereby improve the prospects for its acceptance by the Indonesian people. In this process, the role of the judiciary would necessarily be crucial.²²² Yet, as has been seen, the courts under the

217. A related use of the principle of development by the Supreme Court occurred in the *Pluit Polder Plan Case*, in which the eviction of landowners in West Jakarta was held to be a nonjusticiable administrative act committed in furtherance of development under the Pluit Polder Plan. See Judgment of Mar. 25, 1976, Supreme Court. For a further discussion of the use of "social function" as the legal justification for land expropriation, see Sunario Basuki, *The Concept of State as Landholder*, 3 *INDON. HUM. RTS. F.* 13, 14 (1992).

218. Even the World Bank admits that the assessment of compensation for land acquisition causes social conflict and disruption. See *WORLD BANK*, *supra* note 131, at 20-21.

219. A recent example is the rioting experienced in the Timika region of Irian Jaya as a result of local opposition to the gold and copper mine operated by PT Freeport Indonesia. See *Irian Copper Town Calm But Tense After Riots*, *JAKARTA POST*, Mar. 14, 1996, at 1.

220. See *supra* note 3 and accompanying text. These principles might consist of mutual assistance, harmony, discussion and deliberation, and social function in its original sense. See *supra* notes 24-30 and accompanying text; see also Supomo, *supra* note 94, at 235 ("Traditional *adat* law expresses such universal values as the principle of mutual aid, the social function of man and property in the community, the principle of consent as a basis of public authority, and the principle of representation and consultation in the system of government.").

221. See MILTON SANTOS, *THE SHARED SPACE* 27 (1979) (discussing way in which such dualisms in developing countries actually disguise hegemony of "upper circuit").

222. See, e.g., HOOKER, *supra* note 29, at 6-8; TER HAAR, *supra* note 2, at 228-34; Burns, *supra* note 24, at 109 (discussing ter Haar's view on fundamental role of judges in attaining Indonesian legal unity); Djojodigoeno, *Adat Law in Indonesia*, 49 *ASIAN REV.* 38, 38-44 (1953). It is tempting to draw parallels between incorporating *adat* principles into formal law in Indonesia and the development of the common law from Anglo-Saxon custom in England. However, there are such crucial differences between the two processes that the attempt in Indonesia should be jettisoned. These differences include the

New Order government have used the principle of social function to excuse apparent failures to comply with legislative requirements governing the acquisition of land for development. They have also failed to develop any meaningful principles to govern the application of "discussion and deliberation" in the context of the formal legal system.²²³ Indeed, there is a widespread lack of public confidence in the courts' independence and competence. This is due largely to a perception that the judiciary is corrupt.²²⁴ In part, this perception arises because court orders are often ignored by the bureaucracy.²²⁵ Finally, and perhaps most significantly in the long run, courts are guilty of "legal norm shopping" in order to attain the result desired by the state; they apply one of a wide range of potentially applicable legal rules or principles to a case without providing predictable or consistent reasons for the choice. A good example of this phenomenon is the use of the power of review and the principles of social function and development in the *Kedung Ombo Dam Case* discussed previously.

Many of these issues, particularly legal norm shopping, are highlighted by reports of a recent land acquisition dispute in Irian Jaya. This dispute arose out of the Irian Jayan government's expropriation of sixty-two hectares of communal land near Sentani Airport in Irian Jaya in 1984. Hancock Hebe Ohee, the head of the Ongge and Hanoch subclans that owned the land according to its *adat* law, brought an action in the Jayapura District Court against the governor of Irian Jaya claiming a greater amount of compensation than had been offered.²²⁶ Mr. Ohee succeeded in the District Court in July 1985 and on appeal in the Supreme Court in 1988. The Supreme Court ordered that Rp. 8,600,000,000 (approximately U.S. \$4,200,000) be paid to the plaintiff as compensation for the loss of the communal land.²²⁷ The Irian Jayan provincial government apparently refused to pay this sum, arguing that it lacked the funds. An impasse ensued. Finally, in April 1995, Chief Justice Soerjono of the Supreme Court sent a letter pursuant to the 1985 Law on the Supreme Court, which, *inter alia*, empowers the Chief Justice to give instructions and guidance to lower courts,²²⁸ directing the Jayapura District Court not to execute the 1988 Supreme Court decision. Chief Justice Soerjono

tremendous regional diversity in *adat*, varying stages of economic development, the existence of a patrimonial state bent on rapid economic development, the absence of an independent judiciary, and the postcolonial, oligarchic alliance of bureaucracy and private commercial interests in Indonesia. The net effect is that the process of incorporating *adat* principles into formal law has been subverted and perversely used to give legal legitimacy to the arbitrary exercise of executive power.

223. For example, the courts in *Kedung Ombo* failed to respond to the respondents' submission that the requirement of discussion and deliberation had been satisfied.

224. The Secretary-General of the National Commission on Human Rights reportedly said that most people who lose their land choose to file their complaints with the Commission because common people are most likely to lose in court and stronger industrialists with government backing are almost sure to win. See *Judges Advised To Follow Code of Ethics*, JAKARTA POST, Apr. 29, 1995, at 2.

225. For example, the Land Registry Office has been known to refuse to follow court orders to rectify the registration of land titles. See PARLINDUNGAN, *supra* note 138, at 97-98.

226. See *Group of Young Lawyers Decry Chief Justice*, JAKARTA POST, May 2, 1995, at 2; *Moslem Students Protest over Irian Jayan Land Row*, JAKARTA POST, May 13, 1995, at 2.

227. See *Moslem Students Protest over Irian Jaya Land Row*, *supra* note 226; *Irian Man Can Start Again*, JAKARTA POST, Apr. 27, 1995, at 2.

228. See INDRA, *supra* note 205, at 3; Himawan, *supra* note 212, at 1 (discussing Law No. 14, art. 32 (1985) (Indon.)).

based his direction principally on the grounds that the governor of Irian Jaya was only an individual and that the relevant defendant should have been the Irian Jayan government which was the legal entity holding the land in question.²²⁹ It is notable that when former Chief Justice Purwoto S. Gandasubrata, under whom *Kedung Ombo* was decided, was asked to comment on Chief Justice Soerjono's actions, he replied that very often a Chief Justice will intervene in a case handled by the Supreme Court at the instigation of third parties and not on his or her own initiative. He also reportedly stated that "[we] often receive requests from the government to cancel or delay the execution of a Supreme Court ruling in the name of development" ²³⁰

The Indonesian Bar Association criticized Chief Justice Soerjono's action on the basis that the 1985 Law on the Supreme Court did not allow the reevaluation and reinterpretation of final Supreme Court decisions. His action was also criticized by the National Commission for Human Rights on the basis that the 1974 Law on Public Administration stated that regional governors were not simply individuals but heads of provinces empowered to represent the local people.²³¹ Even the Minister of Justice criticized the Chief Justice's action on the basis that the 1985 Law on the Supreme Court was not intended to allow Chief Justices to nullify Supreme Court decisions, and that, in any event, the issue should have been discussed openly with the other Supreme Court justices and the direction couched in advisory terms only. Charles Himawan has also pointed out that one consequence of the Chief Justice's action is that Indonesia now has a de facto five-tier judicial system, when the original intention was that it be only three-tier.²³² The first tier is the District Court at first instance; the second is the appellate level of the District Court; the third is the appellate jurisdiction of the Supreme Court; the fourth is the power of review vested in the Chief Justice, which nowadays is invariably requested by aggrieved parties; and the fifth appears to be the Chief Justice's power to advise lower courts how to execute Supreme Court judgments.

IV. REFORM

A. *Essential Elements of Reform*

Although a detailed analysis of possible reforms of Indonesian land law is beyond the scope of this work, it is appropriate to outline some measures that would address the problems that I have identified. Before I do this, however, some introductory comments are necessary. Solely committing further resources to the process of title registration, without reforming the BAL and associated areas, will not resolve the problems with modern Indonesian land law and administration. The problems require a holistic

229. See *Group of Young Lawyers Decry Chief Justice*, *supra* note 226; *Mostem Students Protest Over Irian Jayan Land Row*, *supra* note 226.

230. See Kern, *supra* note 187, at 101-31.

231. See Law No. 5 (1974) (Indon.) (on Public Administration).

232. See Himawan, *supra* note 212.

solution that addresses issues of dispute resolution, access to credit, compulsory acquisition, corruption, unlawful occupancy, and, above all, the relationship between *adat* and the state. The flaw in Indonesia's PRONA program and the World Bank's Land Administration Project is that these issues, especially dispute resolution, are not treated as essential to the success of the project. Instead, there seems to be a simplistic belief that systematic registration, accompanied by registration of group titles in *adat* areas, will by itself create greater unity and certainty in Indonesian land law.

A second and related point is that the process of reforming Indonesian land law can neither ignore *adat* nor assume that over time it will wither away. It is true that *adat* authority has been significantly eroded in Java and in major cities, and that in other areas, it is under considerable threat from a combination of economic development and Government policy. Nevertheless, *adat* values and practices are still likely to retain significant influence in most rural areas of Indonesia for the foreseeable future, if only because they are embedded in local social structure. Local *adat* rules and authority are also likely to remain influential in most parts of Indonesia as an expression of regional, non-Javanese identity. A realistic and effective Indonesian land law must reflect this social reality if it is to avoid uncertainty, conflict, and social dislocation.

Third, the BAL's operation shows that a vague and ill-defined attempt at incorporating *adat* principles into formal statutory law cannot achieve legal unity and certainty in Indonesia. Indeed, those *adat* principles that seem to be universal—namely, the notions of equilibrium, collective unity, discussion and deliberation, and social function—are so embedded in diverse local social structures, and so lacking in Western-style legal predictability, that they are not susceptible to incorporation into formal law, particularly in the context of a patrimonial state bent on economic development and lacking an independent judiciary. Accordingly, law reform in Indonesia must work towards appropriate links between formal law and *adat* authority. In other words, formal law should establish a balanced dualism between *adat* and state in place of the present hegemony of state and bureaucracy in which *adat* is subjugated and eroded and large areas lack the certainties of either traditional *adat* or formal law.²³³ Briefly put, this requires that the law should work through *adat* authority, recognize the internal sovereignty of *adat* groups, and take into account the tremendous regional variations in Indonesian *adat*. All these matters may be encompassed within a system of registration, discussed below.

B. *Registration Generally*

1. *Internal Sovereignty of Adat Groups*

In light of these introductory comments, the legislation that replaces the

233. See generally ANN SEIDMAN & ROBERT SEIDMAN, STATE AND LAW IN THE DEVELOPMENT PROCESS 34, 148, 167 (1994) (discussing way in which formal law in postcolonial societies has generally been used as hegemonic tool to entrench oligarchic bureaucracies).

BAL should establish, as a cardinal principle, the *prima facie* sovereignty of *adat* "groups"²³⁴ over land use and allocation within the group's boundaries. This would entail a modified version of the pre-BAL Supreme Court position that village decisions over land use and allocation were nonjusticiable.²³⁵ Such a principle would give *adat* authority the formal status necessary for an appropriate interaction between state and *adat*. It would also recognize that the best place to resolve a land dispute is within an *adat* group,²³⁶ and that local cooperation and initiative are preconditions to nondiscriminatory and harmonious economic development. The way in which this principle of sovereignty would interact with the process of registration is considered below.

2. Sovereignty over Hak Ulayat Land

An *adat* group's sovereignty should extend to the uncultivated *hak ulayat* land within its boundaries.²³⁷ This would remedy the present highly uncertain situation in which, on the one hand, the BAL formally recognizes original acquisition of rights by *adat* means (i.e., through cultivation, clearing, or occupation),²³⁸ while, on the other hand, the state regularly denies formal rights to occupiers of virgin or abandoned land on the basis that it holds a "state *hak ulayat*." It would also avoid the perverse economic incentives that induce developers to seek rights in *hak ulayat* land, even though it may be less suitable for development than other land, simply because they can acquire these rights from the state at below-market price.

Finally, including *hak ulayat* land within an *adat* group's title would not necessarily make large tracts of land unavailable for development—despite government misconceptions to the contrary. As Franz von Benda-Beckmann has cogently argued, traditional communities are not antagonistic to development *per se*.²³⁹ Moreover, the notion that individual titles are a precondition to development is a myth, as any study of corporate and cooperative landholdings in Western development would show. In any event, where negotiated acquisition proves unsuccessful, the government will be able

234. An *adat* group may be defined as "a tribe, clan, section, family or other group of persons, whose land under recognised customary law belongs communally to the persons who are for the time being members of the group." This is the definition used in the Kenyan Land Adjudication Act that was enacted in 1968. See SIMPSON, *supra* note 111, at 233.

235. See, e.g., Judgment of Nov. 26, 1958, Supreme Court, Dec. No. 361 K/Sip/1958 (Indon.) ("It is the fixed jurisprudence of the The Supreme Court that the Court is not authorised to review a village decision concerning land."); see also Judgment of the High Court of Surabaya, Dec. No. 162/1954.Pdt. Both of these decisions are discussed in ABDURRAHMAN, *HIMPUNAN YURISPRUDENSI HUKUM AGRARIA* [COLLECTION OF JURISPRUDENCE ON LAND LAW] 361, 366 (1980).

236. See, e.g., VON BENDA-BECKMANN, *supra* note 103; see also KNETSCH & TREBILCOCK, *supra* note 111, at 56–57 (discussing way in which culturally consistent informal mediation led to more enduring settlements than formal arbitration).

237. This is the case in Malawi, where, under the Customary Land Development Act of 1967, virgin land within traditional boundaries is registered as "unallocated garden land" so that customary methods of allocation remain valid. Similarly, in the southern states of Nigeria, all virgin land is presumed to be subject to local rights of ownership unless shown otherwise. However, in the Sudan, the presumption goes the other way. See SIMPSON, *supra* note 111, at 231–33.

238. See BAL, art. 27; see also *supra* notes 52, 176–81 and accompanying text.

239. See von Benda-Beckmann, *supra* note 115, at 129, 129–48.

to exercise its powers of compulsory acquisition. In such situations, however, full market price compensation should be paid in order to avoid the perverse incentives identified above.

C. *Registration Options*

1. *Choice of Registration*

Because sporadic registration is ineffective, a process of systematic registration should be retained.²⁴⁰ *Adat* groups, however, should have a number of choices in relation to registration of titles and dealings. These choices appropriately reflect the wide diversity of *adat* and of the stages of economic development in regional Indonesia. Their rationale is based on three principles. First, the appropriate goal of registration is not to alter tenure, but to confer certainty on ownership and dealings in land.²⁴¹ Second, traditional communities are entitled to choose to forgo economic benefits in favor of social and cultural harmony. Third, restrictions on the alienation of some classes of land are necessary to protect less literate and commercially inexperienced groups in Indonesian society from landlessness and exploitation.

2. *Registration as "Customary Land"*

The first choice available to an *adat* group would be simply to register its land as "customary land." Here, the registry map would not show titles but only boundaries and the name of the group.²⁴² This would cater to two different situations. First, when customary law effectively provided certainty of tenure and dealings, the major argument for registration of titles would become otiose.²⁴³ Second, in cases such as the Ambon case study discussed above, in which land disputes were so embedded in local societies, adjudication would lead to far more conflict than certainty.

Registration as customary land would serve another crucial purpose: to allow restraints on alienation where such restraints would be necessary to protect vulnerable groups in Indonesian society. In particular, formal restraints on alienation of registered customary land would recognize that granting unfettered rights of alienation to customary landholders often leads to landlessness, exploitation, loss of an effective source of social insurance,²⁴⁴ and erosion of socially binding magico-religious connections with land. Even where titles were otherwise registered, registration as nonalienable customary land would also be appropriate for burial places, sacred sites, and places of

240. See *id.* at 140–41 (assessing effectiveness of unsystematic government regulation).

241. See SIMPSON, *supra* note 111, at 233.

242. This process was adopted in Malawi under the Customary Land Development Act of 1967. See *id.* at 237.

243. For example, in Africa, there are many instances of productive, efficient, and large-scale agricultural development on unregistered customary land. See *id.* at 9.

244. It is notable in this regard that Indonesia does not have a comprehensive system of social security, which means that land and local social structure are the only forms of social insurance for most Indonesians.

worship.²⁴⁵ Finally, registration as customary land would be relatively quick, which would ameliorate the present unsatisfactory situation in which regional bureaucracies often argue (wrongly) that the mere fact of nonregistration means that formal title does not exist, and that the land in question therefore has reverted to the state.

3. *Register of Dealings*

Although ownership would be nonalienable, an *adat* group registering its land as customary land should be able to access the processes of economic development through an accompanying register of dealings. This would record agreements with outsiders that concern the customary land. Such agreements should say nothing as to title, but should be binding *inter partes*, and should operate as a form of notice to outsiders subsequently acquiring an interest in the land. Thus, registered agreements should take priority over unregistered ones, and the principle of “first in time prevails” would govern in situations involving competing registered instruments.²⁴⁶ This system would allow outsiders to have certainty in the indefeasibility of a registered agreement, without incurring the conflict of adjudicating uncertain and overlapping titles. The possibility of post-registration, intra-group disputes should also be minimized by a requirement that there be a period of notice for any applicant to register an agreement, and that all group claimants to the land must agree in writing with the registered agreement.

Another condition precedent to validity of a registered agreement should be that a local Land Court, discussed in further detail below, approve the fairness and appropriateness of the dealing, taking into account the consideration and the appropriateness of the development. These criteria should also be applied to determine whether an agreement should be registered if a group claimant were to refuse to consent to the agreement. Unrecorded agreements entered into prior to establishment of the register would also only be enforceable if they satisfied a similar test of fairness and appropriateness. Finally, a special security should be developed to allow for a specified section of the customary land to be leased in the event of default.²⁴⁷

4. *Registration of Individual Occupancy*

The second choice available to an *adat* group should be to record individual occupancy, but not necessarily “rights,” within the group’s land. Simpson notes that this approach was effective in West Malaysia, an area with

245. A good example of the need for such registration is the recent major land dispute in Bali, in which land traditionally within the boundaries of the Tanah Lot Temple, one of the holiest temples in Bali, was expropriated for a tourist development. The authorities claimed that the land in question was not within the temple’s boundaries. See *Hindu Students Visit Legal Aid Office*, JAKARTA POST, Mar. 4, 1994, at 3.

246. Knetsch and Trebilcock strongly argue, in the context of Papua New Guinea, that a system of registered dealings of this kind would produce many of the benefits of registered titles without incurring the conflict-created adjudication. See KNETSCH & TREBILCOCK, *supra* note 111, at 62–65.

247. See *id.* at 50 (discussing need for security to avoid landlessness and exploitation in customary societies).

similar *adat* to that of West Sumatra, in providing certainty over time as occupancy evolved into an accepted right of possession.²⁴⁸ Transfer of possession in this instance would simply involve an alteration of the relevant name in the local register. Any other dealing, including the provision of security, should have to be conducted through the register of dealings discussed above, with the exception that in this case individual claimants would have to agree to the dealing. This system would allow individual tenure to evolve over time without encouraging the types of disputes notorious in systematic registration of individualized titles in areas where communal forms of tenure prevail. It would be preferable to proposals to introduce a system of qualified titles in Indonesia, in which registration would be conditional for ten years and indefeasible thereafter, because it would tend to avoid far more the problems of corruption and disassociation of village members from title registration that were discussed before.

5. Group Registration

The third possibility should allow the *adat* group to record its group title in the name of a representative appointed in accordance with a prescribed procedure. The representative should hold title in trust (the Indonesian expression *atas nama* conveys a similar meaning) for group members. Bona fide purchasers of an interest in the land would need only to deal with the representative, and group members would be limited to a personal action in damages against the representative in the event of any breach of trust by the representative. The representative would also be required to sign a sworn statement that any dealing concerning the land followed a process of consensus through deliberation with community members.²⁴⁹

Intra-group aspects of a registered group title should be determined by the principle of internal sovereignty discussed above. That is, the *adat* group should continue to determine the content and operation of individual rights and obligations within the *adat* group. This would retain the subtle and complex processes of *adat* discussed earlier in this Article, and obviate the need to provide statutory equivalents of individual *adat* rights in each region.²⁵⁰ At the same time, however, these intra-group rights and obligations should not apply to outsiders who acquire interests in the group title. In this case, the interest in question would have to correspond to, and be regulated by, formal statutory rights of lease, use, and so forth. This approach would buttress local social structure without detracting from the certainty required to encourage outside investment.

248. See SIMPSON, *supra* note 111, at 229.

249. This is the system adopted in Nigeria. See SIMPSON, *supra* note 111, at 232-23 (discussing role of family representative in Registered Land Act of 1965).

250. Another flaw in the World Bank's proposals is that they do not provide for the myriad of different *adat* rights in each region. This breaches the principle that effective title registration should reflect tenure rather than alter it.

6. *Individualized Titles*

Finally, the *adat* group could choose at any time to partition the land among its members, with each one then holding individual, registered titles. This would allow for any natural process of individualization in *adat* to be reflected in formal law. In addition, in those areas, such as Java and most urban areas, where there is no true *adat* "group," individual titles would be the only option. In order to avoid the problems with corruption and injustice in the present process of land registration, a representative from the Land Court, and not a state-appointed committee, should undertake the process of adjudication. When disputes arose, and there were no *adat* group from which resolution could be sought at first instance, the preliminary fact of occupancy should be recorded, with a subsequent adjudication of title by the Land Court. Community spirit and amenities should be protected though an effective system of zoned land use. Finally, all titles, whether group or individual, would not be indefeasible, and transactional formalities should be kept to a minimum so that the registry could continue to reflect reality.

Unlawful occupiers should be granted title in cases in which the true owner had made no attempt to enforce his, her, or its interests for seven years. This would be consistent with studies that show that granting title to squatters minimizes disputes and encourages greater efficiency and investment in land use.²⁵¹ It appears to be the only practicable way to deal with the huge numbers of unlawful occupiers in contemporary Indonesia.

D. *Dispute Resolution and the Land Court*

Of course, none of these proposals could work without an effective system of dispute resolution. To this end, a separate Land Court should be established in Indonesia. The rationale for such a court is the lack of confidence in the general court system, as well as the early success and independence of such separate institutions as the National Commission for Human Rights and the new Administrative Court.²⁵² The Land Court should be empowered to resolve all disputes involving land, including those internal to *adat* groups. In these cases, however, the court should first attend as an observer and recorder while the parties seek to resolve the dispute through traditional means of discussion and consensus. A recorded agreement should be enforceable by Land Court procedures. If this approach proves ineffective,

251. See Burns, *supra* note 118, at 13 (discussing Thai land policy).

252. The government-established National Commission for Human Rights has produced a number of reports that are highly critical of the government, most recently in relation to riots after the disbanding of opposition leader Megawati Sukarnoputri's headquarters in Jakarta. On this highly sensitive political matter, the Commission reported, contrary to the government's version, that the storming of the headquarters had not been conducted by an opposition faction disgruntled with Sukarnoputri, but by a paramilitary force that had been trained in secret for this purpose for some time. See, e.g., *More Megawati Supporters Go on Trial*, JAKARTA POST, Oct. 15, 1996, at 3.

The Administrative Court has also revealed its independence by holding that the 1996 closure of a number of magazines critical of the government had not been carried out in accordance with statutory procedures. Notably, however, this decision was overturned on appeal by the Supreme Court. See, e.g., *Supreme Court Under Fire over 'Tempo' Verdict*, JAKARTA POST, June 14, 1996, at 2.

and at least one of the parties wishes the matter to proceed further, a more formal process of mediation should be adopted with relevant local *adat* principles being applied. Again failing resolution, the court should make and record a formal determination. When an outsider, including the state, is a party to a dispute with an *adat* group, the outsider should lodge a compliance bond that would be lost in the event of noncompliance with any Land Court order. As stated above, Land Court judges should also supervise *adat* groups' dealings with outsiders.

Finally, the possibility of corruption in the local Land Court can be diminished but not discounted. The best way to minimize this possibility is to provide high salaries for judges, a clear set of principles and rules governing the determination of land disputes, and a system of reporting leading judgments. In addition to a statement that *adat* rules should be applied whenever possible, the set of principles should give clear guidelines on two other matters. First, it should define the *adat* principle of consensus through discussion and deliberation. For example, discussion and deliberation should mean that every adult group member has been consulted, and that consensus does not exist when a significant number of members disagree. In addition, the principles should state clearly that appeals from the Land Court to the Supreme Court are on matters of law only; that this means that findings of fact cannot be overturned unless reached through an error of law; that the concepts of social function and development cannot override legislative requirements; and that the Chief Justice's power of "review" can only be exercised when new evidence reveals a gross miscarriage of justice.

V. CONCLUSION

The BAL is a centerpiece of the Indonesian government's efforts at legal unification. Yet, thirty-six years after its passage, it has spectacularly failed to achieve its objectives of legal unity and certainty. The immediate lesson of this failure seems to be that the BAL's syncretic approach to legal unification, in which purportedly universal *adat* principles are incorporated into Western-style statutory law, is impossible in the context of modern Indonesia, particularly when the judiciary and *adat* communities are subordinate to the state's drive for economic development. Another implication—one with great significance for the legal unification debate—is that the regional variations in Indonesian *adat* are such that the whole notion of universal *adat* principles lacks sufficient precision or substance to form the foundation for unified national law. For both of these reasons, this Article argues that *adat* authority, not vague and ill-defined *adat* principles, must be the basis of modern Indonesian law reform. This will require, as a starting point, that formal law recognize the internal sovereignty of *adat* groups and create graduated mechanisms by which those groups can participate appropriately in the process of development. The alternative is that Indonesia will truly become, as Von Vollenhoven warned, an inequitable and conflict-ridden "museum of *adat*."²⁵³

253. See Burns, *supra* note 24, at 42 n.58.